Admin. August 29, 2002

Memorandum 2002-38

New Topics and Priorities

BACKGROUND

It is the Commission's practice annually to review the topics assigned to it for study, consider suggested new topics, and determine priorities for work during the coming year. The Commission's enabling legislation identifies two categories of topics assigned to the Commission — those which the Commission selects and lists in its calendar of topics for study (provided they are thereafter approved by the Legislature), and those which the Legislature refers to the Commission for study. Gov't Code § 8293.

This memorandum reviews the status of studies assigned to the Commission to which the Commission may wish to give priority during the coming year, and summarizes suggestions we have received for new topics that should be studied. The memorandum concludes with staff recommendations for allocation of the Commission's resources during the coming year.

The following letters, email communications, and other materials are attached to and discussed in this memorandum:

Exhibit p.

1. Calendar of Topics 1
2. Stephen D. Bradbury, California Judges Association 4
3. Edmund L. Regalia, Commissioner 5
4. Dibby A. Green, Certified Legal Assistant Specialist 11
5. Patricia Conrey, Sun City, AZ 17
6. Gerald H. Genard, Danville 21
7. Larry Stirling, Judge, San Diego County Superior Court 24

The staff has also been informed by others that they intend to submit project proposals. We will supplement this memorandum if their communications are received in time for consideration at the Commission meeting.

It is worth stating at the outset that **the staff is negative towards the concept of the Commission taking on any new projects or activating any new priorities**. We are currently overwhelmed with work, with far too many major projects

underway simultaneously, and more in the pipeline. This is at a time when our resources are severely reduced. We have suffered a 15% budget reduction for the current fiscal year, causing us to lay off our administrative assistant and reduce our legal staff by one position. The Department of Finance has indicated that we need to plan for the likelihood of an additional 20% budget cut for next fiscal year. That will necessitate further severe personnel reductions (unless state revenues unexpectedly revive, or we are able to save our budget through legislative action).

REVIEW OF LAST YEAR'S DECISIONS

Last Year's Decisions

At its last annual review of new topics and priorities, the Commission decided that during 2002 it would (1) request no legislative authority to study new topics (other than to expand the scope of the criminal sentencing project), (2) take up previously assigned topics whenever background studies for those topics are delivered by consultants, and (3) attempt to make steady progress on projects that have previously been activated.

The Commission also directed the staff to follow up with the California Judges Association concerning their views on what needs to be done in the attorney's fee study. And the Commission decided to enlist law student help for further study of the law governing inheritance from a child born out of wedlock, in light of *Estate of Griswold*, 108 Cal. Rptr. 2d 165 (2001).

Action on Last Year's Decisions

During 2002 the Legislature approved expansion of the criminal sentencing project. See ACR 123 (Wayne). The status of that project is discussed in detail in Memorandum 2002-47, scheduled for consideration in September 2002.

During 2002 the Commission commenced work on these new projects, following delivery of the consultant's background study:

- Discovery Improvements from Other Jurisdictions (Background Study Prepared by Prof. Gregory Weber) — commenced May 2002.
- Criminal Procedure Under Trial Court Unification (Background Study Prepared by Prof. Gerald Uelmen) — commenced July 2002.
- Comparison of Evidence Code with Federal Rules (Background Study Prepared by Prof. Miguel Mendez) — to be commenced September 2002.

During 2002 the Commission made progress on these previously activated studies, among other matters:

- Common Interest Development Law
- Statutes Made Obsolete by Trial Court Restructuring
- Uniform Unincorporated Nonprofit Association Act
- Appellate and Writ Review Under Trial Court Unification

During 2002 the staff followed up with the California Judges Association concerning their views on what needs to be done in the attorney's fee study. Their response is discussed below, under "Topics Listed in the Commission's Calendar of Topics."

During 2002 the staff enlisted law student help for further study of the law governing inheritance from a child born out of wedlock, in light of *Estate of Griswold*, 108 Cal. Rptr. 2d 165 (2001). See Memorandum 2002-35, scheduled for consideration in September 2002.

TOPICS LISTED IN THE COMMISSION'S CALENDAR OF TOPICS

The Commission's enabling statute recognizes two types of study topics — those which the Commission identifies for study and lists in the Calendar of Topics that it reports to the Legislature, and those which the Legislature assigns to the Commission directly. Gov't Code § 8293. However, the Commission may not address those that it has identified for study until the Legislature, by concurrent resolution, approves them for study by the Commission.

The bulk of the Commission's study topics have come through the first route — matters identified by the Commission and approved by the Legislature. Direct legislative assignments have been relatively rare in the past but have become more common in recent years. Some of the major topics currently occupying the Commission (including review of civil and criminal procedures and appeals in a unified trial court system, and repeal of statutes made obsolete by trial court restructuring) are the result of direct legislative assignments, not requested by the Commission.

In the past, the Commission has tended to incorporate direct legislative assignments into its Calendar of Topics, mixing them with studies requested by the Commission. However, for reasons relating to legislative procedures involving adoption of the Commission's concurrent resolution, the staff has come to the conclusion that this is no longer a desirable practice. We should follow the

practice originally contemplated by the Commission's enabling legislation, and distinguish matters identified by the Commission from those assigned by the Legislature.

This section of the memorandum reviews the status of matters currently listed in the Commission's Calendar of Topics. The next section discusses matters assigned by the Legislature directly.

The Commission currently lists 20 topics in its Calendar of Topics. These topics have all been previously approved by the Legislature. The most recent concurrent resolution is ACR 123 (Wayne). A precise description of each topic is appended at Exhibit pp. 1-3. The Commission has completed work on a number of the topics listed in the calendar — the authority is retained in case corrective legislation is needed.

Below is a discussion of each topic in the calendar. The discussion indicates the status of the topic and the need for future work. If you believe a particular matter deserves priority, you should raise it at the meeting.

1. Creditors' Remedies

Beginning in 1971, the Commission made a series of recommendations covering specific aspects of creditors' remedies and in 1982 obtained enactment of a comprehensive statute governing enforcement of judgments. Since enactment of the Enforcement of Judgments Law, the Commission has submitted a number of narrower recommendations to the Legislature.

Enforcement of Judgments and Exemptions. There are specific statutes directing the Commission to study enforcement and exemptions. The directives are discussed below under "Topics Referred by the Legislature."

Judicial and nonjudicial foreclosure of real property liens. Foreclosure is a matter that the Commission has recognized in the past is in need of work, but has always deferred due to the magnitude, complexity, and controversy involved in that area of law. The National Conference of Commissioners on Uniform State Laws has completed work on a Uniform Non-Judicial Foreclosure Act (2002). That may be a useful product for Commission consideration.

Mechanic's lien law. The Commission has had mechanic's lien law under active consideration. The Commission retained three experts in this field to provide advice — Gordon Hunt, James Acret, and Keith Honda. In 2002 the Commission submitted a recommendation on the double liability problem in home improvement contracts and a report on mechanic's lien law reform.

Municipal bankruptcy. The Commission submitted proposed legislation on municipal bankruptcy, which was enacted in 2002.

Assignments for the benefit of creditors. Should California law be revised to codify, clarify, or change the law governing general assignments for the benefit of creditors, including but not limited to changes that might make general assignments useful for purposes of reorganization as well as liquidation. The Commission's consultant is David Gould of McDermott, Will & Emery, Los Angeles. He is currently seeking input from affected parties via a questionnaire.

Creditors' remedies technical revisions. The Commission recommended technical revisions in a number of creditors' remedies statutes. The implementing legislation was enacted in 2002.

2. Probate Code

The Commission drafted the Probate Code and continues to monitor experience under it and make occasional recommendations on it.

Rules of construction for trusts. The Commission has submitted its recommendation, which was enacted in 2002.

Creditors' rights against nonprobate assets. The staff has identified policy issues. The Uniform Probate Code now has a procedure for dealing with this matter. This is an important issue that the Commission should take up when resources permit.

Application of family protection provisions to nonprobate transfers. Should the various probate family protections, such as the share of an omitted spouse or the probate homestead, be applied to nonprobate assets? The Commission needs to address this issue at some point. The Uniform Probate Code deals with statutory allowances to the decedent's spouse and children.

Protective proceedings for federal benefits. It has been suggested that California could perform a service by clarifying the preemptive effect of federal laws on general state fiduciary principles when federal benefits are involved. We requested comment on this matter from the State Bar Estate Trusts and Estates Section some time ago.

Uniform Trust Code. The National Conference of Commissioners on Uniform State Laws has promulgated a Uniform Trust Code (2000). The code is derived from the California Trust Law, which the Commission drafted. The Commission engaged Professor David English of the University of Missouri Law School to prepare a comparison of the Uniform Code with California law. (He is the

Reporter for the Uniform Code.) The concept is to determine whether any of the provisions of the Uniform Code that differ from California law should be adopted in California. The Commission canceled its contract with Prof. English due to budget cuts, but the State Bar Trusts and Estates Section has agreed to fund the research. The report is due this year.

Uniform Custodial Trust Act. The Commission has decided, on a low priority basis, to study the Uniform Custodial Trust Act. That act provides a simple procedure for holding assets for the benefit of an adult (perhaps elderly or disabled), similar to that available for a minor under the Uniform Transfers to Minors Act.

3. Real and Personal Property

The study of property law was authorized in 1983, consolidating various previously authorized aspects of real and personal property law into one comprehensive topic.

Eminent domain law. The California Eminent Domain Law was enacted on Commission recommendation in 1975. The Commission has completed an update project focusing on specific issues in eminent domain law. The last recommendation in the series was enacted in 2002.

Inverse condemnation. The Commission has dropped inverse condemnation as a separate study topic. However, the Commission has agreed to consider the impact of exhaustion of administrative remedies on inverse condemnation, as part of the administrative procedure study. Professor Emeritus Gideon Kanner of Loyola Law School is preparing a report for the Commission on this matter. The study has been deferred pending resolution of several cases currently in the courts.

Adverse possession of personal property. The Commission has withdrawn its recommendation on adverse possession of personal property pending consideration of issues that have been raised by the State Bar Committee on Administration of Justice. The Commission has made this a low priority matter.

Severance of personal property joint tenancy. A low priority project is statutory authorization of unilateral severance of a personal property joint tenancy (e.g., securities). This would parallel the authorization for unilateral severance of a real property joint tenancy.

Environmental covenants and restrictions. The Commission has decided, as a low priority matter, to study an issue relating to environmental covenants and

restrictions. Public agencies often settle concerns over contaminated property, environmental, and land use matters by requiring that certain covenants and restrictions on land use be placed in an agreement and recorded, assuming that because recorded they will be binding on successors in interest in the property. However, there is nothing in the case law or statutes that permits enforcement of these covenants against successive owners of the land because they do not fall under the language of Civil Code Section 1468 (governing covenants that run with the land), nor are they enforceable as equitable servitudes.

4. Family Law

The Family Code was drafted by the Commission.

Marital agreements made during marriage. California has enacted the Uniform Premarital Agreements Act and detailed provisions concerning agreements relating to rights on death of one of the spouses. However, there is no general statute governing marital agreements during marriage. Such a statute would be useful, but the development of the statute would involve controversial issues. One issue — whether the right to support can be waived — should be addressed in the premarital context as well; there are recent cases on this point. The Commission has indicated its interest in pursuing this topic.

5. Offers of Compromise

Offers of compromise was added to the Commission's calendar at the request of the Commission in 1975. The Commission was concerned with Section 998 of the Code of Civil Procedure (withholding or augmenting costs following rejection or acceptance of offer to allow judgment). The Commission noted several instances where the language of Section 998 might be clarified and suggested that the section did not deal adequately with the problem of a joint offer to several plaintiffs. Since then, Section 3291 of the Civil Code has been enacted to allow recovery of interest where the plaintiff makes an offer pursuant to Section 998.

The Commission has never given this topic priority, but it is one that might be considered by the Commission sometime in the future on a nonpriority basis when staff and Commission time permit work on the topic.

6. Discovery in Civil Cases

The Commission requested authority to study discovery in 1974. Although the Commission considered the topic to be an important one, the Commission

did not give the study priority because a joint committee of the State Bar and the Judicial Council produced a new discovery act that was enacted into law.

The Commission in 1995 decided to investigate the question of discovery of computer records; this matter is not under active consideration.

The Commission has initiated a project to review developments in other jurisdictions to improve discovery. This matter is under active consideration by the Commission. See Memorandum 2002-46, scheduled for consideration in September 2002.

7. Special Assessments for Public Improvements

There are a great many statutes that provide for special assessments for public improvements of various types. The statutes overlap and duplicate each other and contain apparently needless inconsistencies. The Legislature added this topic to the Commission's calendar in 1980 with the objective that the Commission might be able to develop one or more unified acts to replace the variety of acts that now exist. This legislative assignment would be a worthwhile project, but would require a substantial amount of staff time.

8. Rights and Disabilities of Minor and Incompetent Persons

The Commission has submitted a number of recommendations relating to rights and disabilities of minor and incompetent persons since authorization of the study in 1979 and it is anticipated that more will be submitted as the need becomes apparent.

9. Evidence

The California Evidence Code was enacted on recommendation of the Commission, and the study has been continued on the Commission's agenda for ongoing review.

Federal Rules of Evidence and Uniform Rules of Evidence. Since the 1965 enactment of the Evidence Code, the Federal Rules of Evidence have been adopted and the Uniform Rules of Evidence have been comprehensively revised. The Commission has engaged Professor Miguel Mendez of Stanford Law School to prepare a comprehensive comparison of the California Evidence Code with the Federal Rules and the Uniform Rules. Prof. Mendez has delivered Parts 1 and 2 of the study. The Commission is about to commence active work on the matter. See Memorandum 2002-41, scheduled for consideration in September 2002.

Electronic communications. The Commission has completed its study of Evidence Code changes to accommodate electronic communications. Legislation implementing the Commission's recommendations was enacted in 2002.

10. Alternative Dispute Resolution

The present California arbitration statute was enacted in 1961 on Commission recommendation. The topic was expanded in 2001 to include mediation and other alternative dispute resolution techniques.

Contractual arbitration improvements from other jurisdictions. The Commission has engaged Professor Roger Alford of Pepperdine Law School to prepare a background study on contractual arbitration statutes in other jurisdictions that may be appropriate for importation into California law. The study is due at the end of 2002.

11. Administrative Law

This topic was authorized for Commission study in 1987 both by legislative initiative and at the request of the Commission. Legislation dealing with administrative adjudication and administrative rulemaking has been enacted. The Commission has recommended legislation on technical and minor substantive cleanup issues. The Commission's recommendation was enacted in 2002.

12. Attorney's Fees

The Commission requested authority to study attorney's fees in 1988 pursuant to a suggestion of the California Judges Association. The staff did a substantial amount of work on the topic in 1990. The Commission deferred further consideration of the matter pending receipt from the CJA of an indication of the problems they see in the law governing payment and shifting of attorney's fees between litigants.

In response to our recent inquiry, Stephen D. Bradbury, President of the California Judges Association, reports that, "We presently do not have particular member interest in the area in question, and suggest it need not continue to be carried on the Commission's agenda." Exhibit p. 4. In light of that response, **the staff suggests** that the Commission shift its focus from the general study originally suggested by CJA to the specific issues identified below.

Award of costs and contractual attorney's fees to prevailing party. The Commission has commenced work on one aspect of this topic — award of costs

and contractual attorney's fees to the prevailing party. The Commission has considered a number of issues and drafts, but has not yet approved a tentative recommendation on the matter. We have put the matter on the back burner due to its complexity and other demands on staff and Commission time.

Standardization of attorney's fee statutes. The Commission has decided, on a low priority basis, to study the possibility of standardizing language in attorney's fee statutes. For example, many provisions allowing recovery of a "reasonable attorney's fee," are qualified by somewhat different standards. The effort would be to provide some uniformity in the law, with a comprehensive statute and uniform definitions. If it is too difficult to conform existing statutes, an effort could be made to create a statutory scheme and definitions that future legislation could incorporate.

13. Uniform Unincorporated Nonprofit Association Act

The study of the Uniform Unincorporated Nonprofit Association Act was authorized in 1993 on request of the Commission. The Commission is actively engaged in this study.

14. Trial Court Unification

Trial court unification was assigned by the Legislature in 1993. The Commission delivered its report on constitutional changes for unification in January 1994. Proposition 220, implementing the report, was approved by the voters on the June 1998 ballot.

The Commission submitted its report on statutory revisions to implement unification in July 1998. The proposed legislation was enacted in 1998, and cleanup legislation recommended by the Commission was enacted in 1999.

Two related projects have been assigned by the Legislature. They are discussed below under "Topics Referred by the Legislature."

15. Contract Law

The Commission's calendar includes a study of the law of contracts (including the effect of electronic communications on the law governing contract formation, the statute of frauds, the parol evidence rule, and related matters).

The National Conference of Commissioners on Uniform State Laws has promulgated a Uniform Electronic Transactions Act, which has been adopted in California, effective January 1, 2000. See Civ. Code § 1633.1 *et seq.* The staff has not yet had an opportunity to explore whether this act addresses all the problems

in the area. Federal legislation has also been enacted to validate electronic signatures.

The staff suggests that the Commission maintain authority in this area and monitor experience under the new enactments for the time being.

16. Common Interest Developments

CID law was added to the Commission's calendar in 1999 at the request of the Commission. The Commission is actively engaged in this study, and has divided it into three phases:

Nonjudicial dispute resolution. The effort here is to provide some simple and expeditious means of avoiding or resolving disputes within common interest communities before they escalate into full-blown litigation. This is a high priority phase of the project. The Commission has made one tentative recommendation on the matter and is working on another. See Memorandum 2002-44, scheduled for consideration in September 2002.

Uniform Common Interest Ownership Act. The Commission will consider whether the Uniform Common Interest Ownership Act should be adopted in California in place of the Davis-Stirling Common Interest Development Act.

General revision of common interest development law. Numerous issues with existing California law have been identified. The staff is compiling and cataloging the issues. After the Commission has completed work on the two topics listed above, we plan to address these issues.

17. Legal Malpractice Statutes of Limitation

The statute of limitations for legal malpractice was added to the Commission's calendar in 1999 at the request of the Commission. The Commission has this matter under active consideration.

18. Coordination of Public Records Statutes

A study of the laws governing public records was added to the Commission's calendar in 1999 at the request of the Commission. The objective is to review the public records law in light of electronic communications and databases to make sure the laws are appropriate in this regard, and to make sure the public records law is adequately coordinated with laws protecting personal privacy.

While this is an important and topical study, we have not given it priority. The staff will work it into the Commission's agenda as staff and Commission resources permit.

19. Criminal Sentencing

Review of the criminal sentencing statutes was added to the Commission's calendar in 1999 at the request of the Commission. The Commission is actively involved in this topic. It is discussed in some detail in Memorandum 2002-47, scheduled for consideration in September 2002.

20. Subdivision Map Act and Mitigation Fee Act

Study of the Subdivision Map Act and Mitigation Fee Act was added to the Commission's calendar in 2001 at the request of the Commission. The objective of the study is a revision to improve organization, resolve inconsistencies, and clarify and rationalize provisions of these complex statutes.

TOPICS REFERRED BY THE LEGISLATURE

Apart from the Commission's calendar of topics, there are statutes that authorize or direct the Law Revision Commission to make studies and recommendations on a number of other matters.

Technical and Minor Substantive Defects

The Commission is authorized to recommend revisions to correct technical and minor substantive defects in the statutes, without specific direction by the Legislature. Gov't Code § 8298. The Commission exercises this authority from time to time. An example is Memorandum 2002-45 relating to obsolete reporting requirements, scheduled for consideration in September 2002.

Statutes Repealed by Implication or Held Unconstitutional

The Commission is directed by statute to recommend the express repeal of any statute repealed by implication or held by the Supreme Court of California or the United States to be unconstitutional. Gov't Code § 8290. The Commission obeys this directive annually in its Annual Report. However, the Commission does not ordinarily sponsor legislation to effectuate the recommendation, for a number of reasons. The Commission has requested staff research on the subsequent history of statutes of this type. The staff is gathering the requested information on a low priority basis.

Enforcement of Money Judgments

Code of Civil Procedure Section 703.120(b) authorizes the Law Revision Commission to maintain a continuing review of the statutes governing

enforcement of judgments. The Commission submits recommendations from time to time under this authority. Debtor-creditor technical revisions were enacted on Commission recommendation in 2002.

Exemptions from Enforcement of Money Judgments

Code of Civil Procedure Section 703.120(a) requires the Law Revision Commission, decennially, to review the exemptions from execution and recommend any changes in exempt amounts that appear proper. The Commission completed the first decennial review during 1994-95 (pursuant to statutes extending time for state reports affected by budget reductions); legislation was enacted. The Commission currently is engaged in the second decennial review. See Memorandum 2002-42, scheduled for consideration in September 2002.

Trial Court Unification Procedural Reform

Government Code Section 70219 directs the Commission to study issues in judicial administration growing out of trial court unification. The Commission is actively engaged in this endeavor, and has obtained enactment of a number of recommendations on these issues.

The major project remaining under Section 70219 is a review of basic court procedures and appeals under unification to determine what, if any, changes should be made. With respect to criminal procedures, the Commission has retained Professor Gerald Uelmen of Santa Clara University Law School as a consultant, has reviewed his report, and is developing a tentative recommendation that would implement his proposals. With respect to civil procedures, the statute contemplates a joint project of the Commission and Judicial Council. The Commission and Judicial Council staffs have been actively involved in background research, and the staff plans to bring the matter before the Commission for initial consideration in November 2002. With respect to appeals and writ review, the Commission has had the matter under active consideration and has deferred further work pending a Judicial Council survey of perceptions of impropriety.

Trial Court Restructuring

The Legislature has directed the Commission to recommend revision of obsolete statutes resulting from trial court restructuring (unification, funding, and employment). See Gov't Code § 71674. The statutory revisions recommended

by the Commission in Part 1 of this project are going through the legislative process in 2002. The constitutional revisions recommended by the Commission in Part 1 of this project are on the ballot for the November 2002 election as Proposition 48. The Commission is now actively engaged in Part 2 of the project. See Memorandum 2002-43, scheduled for consideration in September 2002.

New Legislative Assignments

The 2002 legislative session saw the introduction of three measures to assign high priority, high profile topics to the Commission. The Commission does not take a position on legislation, but the Commission's staff informs the author's office and committee staff what the impact of the assignment would be on the Commission. For all three of these measures, apart from their highly sensitive and volatile political ramifications that make them problematic for the Commission, the significant effect on the Commission would be to divert scant resources from major projects currently underway or about to commence. **The net result of legislative action on all three measures is not to impose any new assignments on the Commission** (unless something unexpected happens with the state budget).

Protection of Personal Information. Assembly Member Papan's ACR 125 directs the Commission to study, report on, and prepare recommended legislation concerning the protection of personal information relating to or arising out of financial transactions. The resolution has been adopted by the Legislature. The study is contingent on funding in the 2002-03 budget, and imposes a January 1, 2005 deadline. The budget conference committee initially included funding for the study in the Commission's 2002-03 budget, but that funding has since been eliminated. Unless there is a change at the time the budget is enacted, the funding precondition is not satisfied, and a study by the Commission is not authorized.

Uniform Money Services Act. Senator Machado's SCR 81 would direct the Commission, through existing resources, to study and make recommendations to the Legislature concerning the advisability of California consolidating and revising its licensing laws governing money transmission, sales and issuance of payment instruments, sales and issuance of traveler's checks, check cashing, and currency exchange, into a single law similar to the Uniform Money Services Act. The study would be made with the assistance of the Department of Corporations and the Department of Financial Institutions, and with technical assistance from

the regulated industry. The study would be due by December 31, 2005. The measure moved quickly through the Legislature but was bottled up in its last committee — Assembly Appropriations — ostensibly due to its impact on Commission resources.

Public Safety Officials Home Protection Act. Assembly Member Dickerson's AB 2238 mandates a report on how to protect a public safety official's home information. The report is due September 1, 2003. At one point the report would have been assigned to the Commission. The staff informed the author's office that it would not be possible for the Commission to comply with that short deadline. We suggested that the Attorney General might be better situated to meet the short deadline. As adopted by the Legislature, the bill creates a task force, chaired by the Attorney General. (The task force does not include the Commission. Our experience with joint projects has been adverse; we operate most effectively when we are in control of a project and make our own recommendations to the Legislature.)

SUGGESTED NEW TOPICS

During the past year the Commission has received a number of suggestions for new topics and priorities. These are analyzed below.

Creditors' Remedies

Commissioner Regalia has suggested that the Commission review the rule announced in *Nipon Credit Bank v. 1333 No. Calif. Blvd.*, 86 Cal. App. 4th 486, 103 Cal. Rptr. 2d 421 (2001). That case involved a loan from the plaintiff bank to the defendant limited partnership for a real estate development project. The terms of the loan agreement required the borrower to pay property taxes. When the development project ran into economic difficulties, the borrower elected not to make property tax payments. The lender stepped in and paid the taxes, foreclosed on the loan, and in addition sued the borrower for damages on the theory of bad faith waste (failure to pay property taxes) causing impairment of the lender's security. The borrower's defense was immunity from liability under California's anti-deficiency laws.

At issue was the judicial "bad faith waste" exception to California's anti-deficiency legislation. The court held that the borrower's failure to pay property taxes could constitute bad faith waste that would be compensable to the plaintiff.

Commissioner Regalia criticizes this decision as creating a new California tort by judicial means, converting a contract obligation into a tort. He suggests that the Commission review the matter, with a view toward corrective legislation. His letter, together with an article he has written about the case, are attached at Exhibit p. 5. He focuses his concern on the dangers the new rule could pose for a residential borrower, particularly at the hands of a less responsible lender than a bank or savings and loan association.

If the Commission is interested in pursuing this matter, we would have existing authority to do so. The Commission's calendar of topics includes the study of "procedures under private power of sale in a trust deed or mortgage" and related matters. In the staff's opinion, the narrow focus of the study suggested by Commissioner Regalia would be appropriate. However, we are concerned about the politics of banking industry influence in the Legislature. We are also concerned about finding time to squeeze this one in, with the other major projects and limited resources confronting the Commission. **The staff suggests this matter be calendared on a low priority basis.**

Probate Code

Several issues in the probate area have been brought to our attention during the past year. The Commission has continuing authority to study probate law, and the Commission's probate projects have been uniformly successful.

Intestate Succession

Questions of inheritance rights surface from time to time. The past year has been particularly bountiful in this respect. The issue of inheritance by a natural parent from a nonmarital child of that parent (*Griswold* case) is examined in Memorandum 2002-35, scheduled for consideration in September 2002. Two other issues have also been brought to our attention.

Inheritance by posthumously conceived child. Assembly Member Tom Harman is a probate attorney and has carried probate legislation for the Commission the past two years. Earlier this year he approached the staff about the possibility of the Commission developing legislation to address questions of inheritance rights where genetic material donated by a person (e.g., sperm or an ovum) is used in the conception of a child some time after the donor of the genetic material has died. Recent cases have struggled with the applicable rules, trying to apply standard inheritance principles to situations not contemplated at

the time the principles were developed. Mr. Harman is looking to legislation for next session.

The staff indicated to Mr. Harman that the Commission would not be in a position to generate a legislative proposal for next session. Moreover, the issues are complex and it will require time and care to come up with appropriate rules. The staff suggested that if he needs something for next session, he could convene a working group of interested persons; the staff would give him some guidance informally on how to go about putting together a project like this.

Mr. Harman has convened such a working group, including participation from the State Bar Trusts and Estates Section, the State Bar Family Law Section, the insurance industry, and Judiciary Committee staff, among others. Discussion at the working group session revealed more complex and farther-reaching issues than had previously been anticipated. It is not clear where the project goes from here. It is possible Mr. Harman will conclude that the idea of legislation for next session is impractical, and will revisit the concept of a Law Revision Commission project.

The staff thinks this is a difficult, important, and timely matter, and would be appropriate for Commission study. **We would be reluctant to commit to it**, however, given the other major topics the Commission currently has underway and upcoming.

Inheritance by natural parent of adopted child. As a general rule, adoption of a child terminates the parent-child relationship between the adopted child and the child's natural parent who gives the child up; the adoptive parent becomes the parent of the child for inheritance purposes. Prob. Code § 6451. Dibby A. Green, a certified legal assistant specialist, has written to suggest that these inheritance laws are based on an older model of adoption as severing the parent-child relationship, whereas today there are many "open" adoptions, where there is a continuing relationship between the adopted child and natural parent. Exhibit p. 11.

Ms. Green provides us with an article (Exhibit p. 12) describing a case involving inheritance from a natural parent who openly held herself out as being the parent of the adopted child and had an ongoing relationship with the child. She argues that the public policy considerations here are similar to the public policy considerations involved in *Griswold* — a natural parent should be required to "openly treat" a child as the parent's own in order to inherit.

In light of the changing nature of adoption, it may be appropriate for the Commission to re-examine the California inheritance statutes with the view to allowing inheritance between a natural parent and adoptive child where there is an on-going relationship between them. Although the staff believes this would be a worthwhile study, **we would not devote our limited resources to it at present**.

Share of Omitted Spouse

If the maker of a will or trust marries after making the instrument and neglects thereafter to amend it to provide for the surviving spouse, the law gives the surviving spouse a share of the decedent's estate (unless it is proved that the decedent intended not to provide for the surviving spouse or provided for the surviving spouse by other means). Prob. Code §§ 21610-21611. The amount of the omitted spouse's share depends on the community or separate character of the estate.

The omitted spouse's share is taken proportionately from the shares of the other beneficiaries, based on the value of the estate at the date of death:

> 26112. (a) Except as provided in subdivision (b), in satisfying a share provided by this chapter:
>
> (1) The share will first be taken from the decedent's estate not disposed of by will or trust, if any.
>
> (2) If that is not sufficient, so much as may be necessary to satisfy the share shall be taken from all beneficiaries of decedent's testamentary instruments in proportion to the value they may respectively receive. This value shall be determined as of the date of the decedent's death.
>
> (b) If the obvious intention of the decedent in relation to some specific gift or devise or other provision of a testamentary instrument would be defeated by the application of subdivision (a), the specific devise or gift or provision may be exempted from the apportionment under subdivision (a), and a different apportionment, consistent with the intention of the decedent, may be adopted.

Note that there is a typo in the section number as enacted — it should be 21612. (The **staff will point this out to Legislative Counsel**, for correction in the annual maintenance of the codes bill.)

The date of death valuation clause was adopted by the Commission at its November 1983 meeting. There are no staff memoranda addressing it, and it was not circulated for comment before it was enacted in 1984.

We have received an email message from Terry Huber pointing out a circumstance where that clause appears to cause unintended results. In the case at issue, the decedent had three children and the decedent left the estate to them equally in his will. When he latter remarried, the decedent did not amend the will to provide for the subsequent spouse. Under the law, the omitted spouse is entitled to a one-third share of the decedent's separate property estate, leaving the children with a two-thirds share.

The decedent's estate consisted of only one significant asset — a 200 acre Malibu ranch. The value of the ranch at the date of the decedent's death (1992) was $2.4 million; when the executor sold the ranch in 2001 its value had declined to $1.4 million. If the share of the omitted spouse is based on the value of the estate at the date of death, that would yield $800,000 for the spouse, leaving only $600,000 for the three children. This result appears to pervert the intention of the statute.

Of course the children should argue that the statute does not provide that result. The only purpose of the date of death valuation is to establish the proportionate shares of all beneficiaries. Once the proportionate shares of beneficiaries have been established based on date of death valuations, that proportion is applied to whatever assets remain when the estate is distributed.

Could that principle be stated more clearly, so that we don't get the kind of litigation that occurred in the Malibu ranch case? Undoubtedly. The question is whether the Commission wishes to spend resources on this matter. The staff thinks this would be a relatively simple clarification to make, and that **we should try to squeeze it in** during the coming year.

Bond of Out of State Executor

Patricia Conrey, of Sun City, Arizona, writes to complain of the California law governing bonds of executors. As a general rule, an executor must post a bond unless the decedent's will waives bond or all beneficiaries waive bond. Prob. Code §§ 8480, 8481. In the case of an out of state resident named as executor, however, the court may in its discretion require a bond notwithstanding waiver of the bond in the will and notwithstanding the fact that all beneficiaries have waived bond. Prob. Code § 8571.

In Mrs. Conrey's case, she was named executor without bond in her sister's will. Despite an apparently impeccable background, the court required her to

post bond. In Mrs. Conrey's opinion, this is simply an unwarranted expense to the estate that is counter to everyone's interest (Exhibit pp. 19-20):

> My complaint about this bond law is that a named executor could have a long criminal record and still receive Letters Testamentary if he/she has a California address (and serve without bond). Does this not appear to you to be not only insane, but a perversion of the law? Yes, the executor needs to be of good character, and if not, to be put under bond. And yes, if the executor lives out of state, proof of stability should be required. But to focus only on "no California address" seems to me (and to everyone with whom I have discussed this) to lack good sense.

Does the Commission wish to revisit the policy of the law governing bonds of nonresident personal representatives? At the time the Commission updated probate procedure in the 1980's the Commission was heavily influenced by members (one a former presiding judge of the Los Angeles County Superior Court's probate department and the other the Los Angeles County Superior Court's probate commissioner) whose perspective on probate procedure and the role of the probate court was protectionist. Although the staff was not necessarily in agreement with the Commission's approach at the time, **we are not sure it makes sense to revisit this matter**, particularly since the bond provision is discretionary with the judge and not mandatory. It is possible that the judge in Mrs. Conrey's case automatically requires a bond of all out of state personal representatives. That would be an abuse of discretion by the judge, and not a defect of the applicable law, however.

Spousal Support

Gerald H. Genard notes a problematic spousal support provision (Exhibit p. 21):

> Except as otherwise agreed to by the parties in writing, there is a rebuttable presumption, affecting the burden of proof, of decreased need for spousal support if the supported party is cohabiting with a person of the opposite sex.

Fam. Code § 4323(a)(1).

Mr. Genard asks why the presumption of decreased need should only apply if the supported spouse is cohabiting with a person of the opposite sex. If the presumption is sound, shouldn't it also apply where the supported spouse is cohabiting with a person of the same sex?

Mr. Genard also questions the exception to this presumption for an agreement in writing between the supported and supporting spouses. He asks why the parties would ever make such an agreement and why a court should be bound by such an agreement.

With respect to both the cohabitation issue and agreements between parties, the **staff sees no need for the Commission to get involved**. We do have existing authority to study Family Code issues. However, the Legislature has a direct and continuing interest and involvement in same-sex issues as well as support issues. These also tend to be highly political matters. We would stay out of it.

Attorney-Client Privilege

Gerald H. Genard points out an inconsistency between Business and Professions Code Section 6068(e), which requires an attorney to maintain the confidentiality of client information, and Evidence Code Sections 956 and 956.5, which provide exceptions to the attorney-client privilege. He asks, "Did the Legislature fail to amend Section 6068(e) when these exceptions to the attorney-client privilege were created? If so, why haven't they fixed the situation?" Exhibit p. 21.

The Legislature was well aware of the existence of Section 6068(e) when it created the Evidence Code provisions codifying principles of the attorney-client privilege. The Law Revision Commission's Comment to Section 955, requiring a lawyer to claim the privilege on behalf of the client, notes that the duty is consistent with Section 6068(e).

Obviously, a statute such as Section 6068(e) which appears on its face to be absolute, inevitably is subject to statutory and judicial exceptions. If we tried to note every limitation or qualification on every rule stated in a statute we would end up with a document more complex than the Internal Revenue Code.

It may be helpful to note major exceptions and limitations in the text of certain statutes. However, **this does not appear to the staff to be a situation where a cross-reference is called for**. The staff notes, however, that at least one court has expressed the same concern as Mr. Genard:

> We note a possible conflict between section 956.5 and Business and Professions Code section 6068, subdivision (e), which requires an attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Appellant did not raise this issue either in the trial court or in his brief on appeal. We sent a letter to counsel under Government

> Code section 68081 asking counsel to address this issue at oral argument. Since our issue is limited to the admissibility of the testimony by Mr. Smith, we need not resolve this conflict. Section 956.5 is an evidentiary rule, while Business and Professions Code section 6068 is a codified rule of conduct for attorneys. The trial court properly applied the evidentiary rule and admitted the testimony. We note that the State Bar Court has held the duty of confidentiality under Business and Professions Code section 6068, subdivision (e) is modified by the exceptions to the attorney-client privilege codified in the Evidence Code. (See *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal. App. 4th 294, 314, 106 Cal. Rptr. 2d 906; see also *General Dynamics Corp. v. Superior Court* (1994) 7 Cal. 4th 1164, 1191, 32 Cal. Rptr. 2d 1, 876 P.2d 487 [recognizing exception to attorney-client privilege where attorney reasonably believes disclosure necessary to prevent criminal act likely to result in death or substantial bodily harm].)

People v. Dang, 93 Cal. App. 4th 1293, 1298-99, 113 Cal. Rptr. 2d 763 (2001).

If the Commission were interested in pursuing this matter, separate legislative authorization would be unnecessary. The Commission is currently authorized to study and make recommendations concerning the Evidence Code.

Alternative Dispute Resolution

Commissioner Sylva has forwarded an email sent to her in her capacity as a Commission member, concerned about arbitrator misconduct in a pending case. The email commentator claims (as edited by the Commission's staff):

> This case involves misconduct and exceeding authority by [a former California Supreme Court justice] while acting as arbitrator and finding for the nation's seventh largest banking concern, contrary to both California law and the dictates of an integrated settlement agreement. This is entirely documented in the case file. Also within the file are the billing records of [the defendant's law firm] establishing numerous forbidden ex-parte communications between [the arbitrator and defendant's attorney]. This case is a study of exactly what should not be allowed to occur in our state. It demonstrates reasons for drastic reform.

The commentator has identified three concerns that a number of people have with arbitration — arbitrator conflicts of interest, the lack of adequate control on arbitrator misconduct, and the lack of reviewability of arbitrator decisions for legal error.

With respect to arbitrator conflicts of interest and misconduct, the Legislature has directed the Judicial Council to adopt ethics standards for neutral arbitrators. Code Civ. Proc. § 1281.85. The rules adopted establish minimum standards of conduct, and address disclosure of interests, disqualification, conduct of the proceeding, ex parte communications, and confidentiality, amount other matters. See *Ethics Standards for Neutral Arbitrators in Contractual Arbitration*, Rules of Court Appendix, Div. VI (July 1, 2002). The Judicial Council has been sued over the rules by the New York Stock Exchange and the National Association of Securities Dealers, claiming the rules are preempted by the Federal Arbitration Act.

With respect to review of arbitrator decisions for legal error, the Commission has retained a consultant to prepare an analysis of possible innovations for California arbitration law based on developments in other jurisdictions. The consultant's study will cover review of arbitrator decisions for legal error. The consultant's study is due at the end of this year.

For these reasons, **the staff would not take further action** at present with respect to the commentator's concerns.

Collection of Victim Restitution, Child Support, and Fines

Judge Larry Stirling of the San Diego County Superior Court notes that enforcement programs for victim restitution, child support, and fine collections all suffer from the same defect — they are enforced primarily by government staff remedies, "which means next to no remedy at all." Exhibit p. 24.

He suggests in effect that collection efforts should be privatized. When the lawfully ordered payment becomes overdue, the order should ripen into a judgment by operation of law, and interest on the unpaid amount should then join the obligation along with the actual and reasonable costs of collection. Collection would be made by means of standard civil creditors' remedies. "This would allow mom to retain an attorney at the defaulter's expense and not the child's. Same with victims assistance and the collections of all fines, forfeitures, penalties, and court costs." He states that his is not done now, and as a result billions of dollars are lost annually. "We have a bloated and ineffective bureaucracy instead."

To make the collection bureaucracy more accountable, Judge Stirling would also require accounts and audits. He states that last year the judges of San Diego County assessed over $80 million in fines and forfeitures (which go to support

the Highway Patrol, local police, and other functions). Of that amount only $8 million was actually paid. The court staff took no action to collect the rest.

Judge Stirling advocates a statute ordering the courts to adopt current accounting methods and produce an annual financial report, which would be audited. This would generate a revenue stream, and would be self-funded. "The effects would spill over into child support and victims assistance, both multi-billion dollar public policy deficiencies." Exhibit p. 25.

Given the efforts that have been devoted to support enforcement procedures over the years, and the various systems that have been tried, including district attorney enforcement, **the staff is dubious that the Commission could add much** to the dialogue. Civil enforcement is clearly an option, but administrative enforcement may be necessary in some circumstances. This is particularly true with respect to victim restitution, for obvious reasons.

The situation with respect to fines and forfeitures is different. If the situation is as Judge Stirling describes it, something ought to be done. However, we doubt that simply requiring audited accounts will do the trick. We suspect that if the courts are lax in enforcing fines, it is probably largely due to lack of resources to devote to that task. In addition, trial court restructuring has disturbed the traditional county-court relationship, and it is no longer clear in many circumstances which entity now has the enforcement obligation and which entity will get the benefit of the fine. That will require a political resolution between the courts and counties. We have seen enough of the politics of court administration in the process of cleaning out obsolete statutes to realize that **this is an area the Commission should try to stay out of**.

Criminal Law and Procedure

Common Barratry (Penal Code §§ 158, 159)

Gerald H. Genard calls the Commission's attention to Penal Code Sections 158 and 159, describing the crime of "common barratry." That crime is the practice of exciting groundless judicial proceedings with a corrupt or malicious intent to vex and annoy.

Mr. Genard asks whether anyone has been prosecuted for the crime, and whether it is possible to meet the criminal burden of proof beyond a reasonable doubt, given the definition of the crime. He also notes the narrow scope of common barratry — "Seems like it's OK to vex and annoy as long as one has the more suitable motive — to obtain money ..." Exhibit p. 22.

The Supreme Court has noted that the crime is seldom prosecuted:

> At common law, barratry was "the offense of frequently exciting and stirring up suits and quarrels" (4 Blackstone, Commentaries 134) and was punished as a misdemeanor. A statutory version of the crime survives today, although it is seldom prosecuted, perhaps because of the requirement that the proof show the defendant "excited" at least three groundless suits "with a corrupt or malicious intent to vex and annoy." (Pen. Code, 158, 159.)
>
> The modern successor of common law barratry, solicitation, is not only a misdemeanor when accomplished through the use of agents, but is also subject to discipline by the State Bar.

Rubin v. Green, 4 Cal. 4th 1187, 847 P.2d 1044, 17 Cal. Rptr. 2d 828 (1993). However, a successful prosecution for barratry does occur on occasion, as illustrated by a relatively recent reported case in which a conviction was upheld on appeal. *People v. Sanford*, 202 Cal. App. 3d Supp. 1, 249 Cal. Rptr. 279 (1988).

Although the crime is obscure, **the staff would not like to see the Commission get involved with this**. Among other obvious considerations is the appearance of a Commission composed of attorneys possibly feathering its own nest by recommending repeal of this crime. (On the other hand, it might be an interesting exercise to expand the crime to cover incitement of lawsuits for personal gain — a proposal likely to be opposed by some sectors of the bar.)

Incidentally, with respect to Mr. Genard's facetious inquiry about "uncommon" barratry, the staff suspects that the crime of "common" barratry is a linguistic evolution of "common law" barratry, from which the crime is descended.

Liquor Sales (Penal Code § 172 et seq.)

Gerald H. Genard points out anomalies in the statutes governing liquor sales near college campuses (and veterans homes). See Penal Code § 172 *et seq*. Among other points he makes are:

- It is illegal to sell liquor within one mile of certain universities, but not others.
- Distances are measured from university borders as the borders existed at various random times in the past.
- Exemptions are provided for some named entities for no apparent reason.
- A general statute for universities with enrollment over 1,000 limits sales within one mile of campus but only if more than 500 students

> live on campus. This leads to quirky results, allowing liquor sales adjacent to student housing depending on the vagaries of how many students live in on-campus housing and the location of off-campus housing. And why is it OK to sell liquor adjacent to a campus where the enrollment is less than 1,000, even though more than 500 students live on campus?

The staff does not think this is an area of law the Commission should become involved with. There are non-legal considerations that go into these statutes, and the Legislature is continually revising them. As Mr. Genard points out, "The Legislature seems to have adopted a course of action which has them fine tuning in this area as opposed to the more obvious and logical approach of leaving such issues to licensing authorities." Exhibit pp. 22-23. The Legislature is perfectly capable of delegating these types of decisions to licensing authorities if it is so inclined. It does not need a Law Revision Commission recommendation to do this.

Crimes Relating to Transportation (Penal Code § 218 et seq.)

Gerald H. Genard points out anomalies in criminal penalties for various crimes relating to transportation:

- The crime of intent to wreck a train is punishable by life imprisonment without possibility of parole, whereas the crime of actual train wrecking is punishable by life imprisonment with possibility of parole (unless someone is killed). Penal Code §§ 218, 219.
- By comparison the crime of wrecking a vehicle operated by a common carrier and causing bodily injury is punishable by imprisonment for two, four, or six years. Penal Code § 219.1. And there is no crime for downing an airplane.
- The crime of throwing an object at a train or other vehicle is punishable as a misdemeanor, as is dropping an object from a toll bridge. Penal Code §§ 219.2, 219.3. But there is no crime for dropping an object from a non-toll bridge, or for that matter blowing up a bridge (except a railroad bridge).

The Commission's authority in the area of criminal sentencing is quite narrow. A project to try to rationalize California's penal statutes would require separate legislative authorization. It would be a massive and hopeless project. This is a highly political area, and one where existing interests are well

positioned to take corrective action where necessary or appropriate. **The staff would stay away from this area.**

"Proving Up" Misdemeanor (Penal Code § 866 et al.)

If a defendant is charged with a felony and is provided a preliminary hearing, must the prosecutor also at the preliminary hearing prove probable cause for a misdemeanor charged in the same complaint? Judge Larry Stirling of the San Diego County Superior Court says the law is unclear on this point and should be clarified. See Exhibit p. 26.

Until 1990, it was clear under the statutes and cases that if a misdemeanor was joined in a felony complaint, a showing of probable cause was required in the preliminary hearing for the misdemeanor as well as the felony. In 1990, Proposition 115 ("Crime Victims Justice Reform Act") was approved by the voters. Among other provisions, Proposition 115 included a statute to the effect that, "It is the purpose of a preliminary examination to establish whether there exists probable cause to believe that the defendant has committed a felony." Penal Code § 866(b). The statute makes no mention of misdemeanors. Some, but not all, statutes have been reworded consistent with Proposition 115.

Judge Stirling states that opinion in the legal community is split on the issue whether a misdemeanor is required, or even permitted, to be proven up in a preliminary hearing. He recites a number of arguments in favor of having a misdemeanor included in the preliminary hearing when joined with a felony. "Please consider addressing in legislation clarification of the impact of Proposition 115 on the scope of preliminary hearings." Exhibit p. 27.

Proposition 115, as an initiative measure, may only be amended on a roll call vote of two thirds of each house of the Legislature, or by a vote of the electors. That should not deter the Commission, if it believes that this matter is appropriate for Commission study. Moreover, the objective of the study presumably would be to clarify the impact of Proposition 115, rather than to change it (although not necessarily, once the Commission gets into it).

Historically, the Commission has not worked extensively in criminal procedure. More recently, the Commission has become involved with criminal procedure in its studies of criminal sentencing and the impact of trial court unification on judicial review. A clarification of the type suggested by Judge Stirling would not be inappropriate for the Commission. However, the staff thinks **the Commission should be careful about what new obligations it takes**

on, and in what areas, given the heavy workload of the Commission in an era of declining resources.

Scope of Motion to Suppress Evidence (Penal Code § 1538.5)

Penal Code Section 1538.5 provides a procedure by which the defendant may move to suppress evidence alleged to have been obtained by the prosecution in violation of the defendant's Fourth Amendment rights (unreasonable search and seizure). The motion is typically a pretrial motion (although in a misdemeanor case it may be made at trial if there was insufficient opportunity pretrial). The ruling on the motion is subject to immediate judicial review.

The 1538.5 motion is limited to Fourth Amendment search and seizure issues. A motion to suppress other evidence, such as a confession obtained in violation of Fifth Amendment or *Miranda* requirements, may not be made under Section 1538.5. Another procedure such as a motion under Section 995 (motion to set aside information or indictment) after a preliminary hearing or an in limine motion before the trial judge must be used. In some circumstances, the unreasonable search or seizure and the confession are so factually intertwined, that a court must necessarily consider both evidentiary issues in the 1538.5 hearing in order to reach an appropriate resolution.

Judge Larry Stirling of the San Diego County Superior Court observes that the variant procedures for non-Fourth Amendment issues result in a wholly unnecessary procedural delay. He suggests that Section 1538.5 be broadened to permit the defense to raise any suppression of evidence issues resting on constitutional grounds. He believes this would substantially simplify the law — "It will be much easier for everyone to understand that there is at least one clear, timely, and effective remedy to provide an early test of important and potentially dispositive evidence issues early in the process." Exhibit p. 28. That would promote more timely resolution of cases.

He argues that resolution of these motions is often dispositive of the case itself — there is no reason not to resolve such fundamental issues as early as possible. Expansion of the 1538.5 procedure would not cause problems for either side, since it is a common motion that the parties are experienced in dealing with. "It is a perfectly good mechanism to resolve a critical matter early in the proceedings." Exhibit p. 29.

The staff does not believe this concept would be well-received in the defense community. The 1538.5 procedure is complex and has procedural issues that

make it problematic for the defense. Of course, Judge Stirling is not proposing to mandate the Section 1538.5 for Fifth and Sixth Amendment issues, only make it an option for the defendant. But defense attorneys the staff has contacted are unenthusiastic about the prospect.

Our take on this study proposal is the same as on the preceding one. A revision of this type, while outside the Commission's "normal" area of civil procedure, would not be inappropriate if the Commission wants to get more heavily involved with criminal procedure. Although Judge Stirling argues that the proposed revision should be unobjectionable, the staff believes this particular proposal would not be an easy one to deal with. Of course, part of the Commission's process involves attempting to resolve concerns in a way that will still enable an improvement of the law. Again, the staff thinks **the Commission should be careful about what new obligations it takes on**, and in what areas, given the heavy workload of the Commission in an era of declining resources.

Crime Victims Restitution (Penal Code § 1202.4 et al.)

Judge Larry Stirling of the San Diego County Superior Court suggests that the Commission review the various victims' restitution laws. "The restitution laws are a veritable thicket of laws that are often redundant, often inconsistent, and unnecessarily complicated." Exhibit p. 30.

Judge Stirling offers a number of specifics that could improve the situation — relocate the various statutes into one place in the Penal Code, avoid attempting to duplicate ordinary civil remedies in the restitution statutes, eliminate "criminal restitution orders", preserve civil restitution orders, and correct due process problems with State Board of Control restitution grants, among other suggestions. He offers to work with us in "replanting this thicket into an attractive and effective hedge." Exhibit p. 33.

The staff agrees with Judge Stirling's evaluation of the restitution statutes. They are indeed complex and confusing and very difficult to work with. At one point in the past Senator Kopp initiated an effort to assign this topic to the Commission, but eventually dropped the matter when he was able to get legislation enacted that addressed his specific concerns. Legislative committee consultants with whom we spoke at the time agreed it would be a boon for all concerned if someone could straighten out the statutes.

The staff believes this would be a worthwhile and achievable reform project for the Commission that would be greatly appreciated. Nonetheless, while it

would make sense for the Law Revision Commission to take on this project, the staff thinks the Commission is oversubscribed right now and will continue to be for a number of years. Does it make sense to request authority in this area, raising the expectation that we will do something, even though we have no intention to turn to the matter for some time? **It is a close call on this one, but the staff thinks it would be better to revisit this issue when there is a reasonable likelihood we can take it up.** Maybe by then someone else will have done the necessary clean up job.

Uniform Statute and Rule Construction Act

In connection with its consideration of the use of Law Revision Commission materials to determine legislative intent (see Memorandum 2002-39, scheduled for consideration in September 2002), the Commission has asked the staff to bring back for possible Commission study the Uniform Statute and Rule Construction Act (1995).

The Uniform Act is an updated version of the Uniform Statutory Construction Act (1965). That act was adopted in three states (Colorado, Iowa, and Wisconsin), although some of its provisions were codified in other jurisdictions. The new Uniform Act covers the following areas:

Uniform Statute and Rule Construction Act (1995)
- § 1. Applicability
- § 2. Common and technical usage
- [§ 3. General definitions]
- § 4. Construction of "shall," "must," and "may"
- § 5. Number, gender, and tense
- § 6. Reference to series
- § 7. Computation of time
- § 8. Prospective operation
- § 9. Severability
- § 10. Irreconcilable statutes or rules
- § 11. [Enrolled bill] controls over subsequent publication
- § 12. Incorporation by reference
- § 13. Headings and titles
- § 14. Continuation of previous statute or rule
- § 15. Repeal of repealing statute or rule
- § 16. Effect of amendment or repeal
- [§ 17. Citation forms]
- § 18. Principles of construction; presumption
- § 19. Primacy of text
- § 20. Other aids to construction
- § 21. Short title

§ 22. Effective date
§ 23. Severability clause for this act
§ 24. Uniformity of application and construction

The National Conference of Commissioners on Uniform State Laws makes the following case for the new act:

> This Act will assist drafters in preparing legislation and rules, government officials and lawyers in applying them, and courts and administrative agencies in construing them. It will significantly reduce the need for the boiler plate language commonly used in bill and rule drafting and provide common definitions of certain words and phrases often used in statutes and rules. It can be used as a summary of the aids to, and principles of, construction and can serve as a useful index to a complex area of the law. This Act will also encourage the development of a body of law as to construction of statutes and rules that will be more uniform than the present law.

The new Uniform Act has been enacted in one jurisdiction (New Mexico).

With respect to the utility of enacting a body of law such as the Uniform Act governing statutory construction, the staff has mixed feelings. It is true that the existing California law on statutory construction is spotty. There are a few general rules of construction in the Government Code, and each of the other codes has a handful of rules of construction that apply to that code. But general principles, such as the specific controls over the general and the later enacted prevails over the earlier enacted, tend to be largely a creation of the courts. If we were to do the job right, we would have to review every section of every code in light of the newly-adopted rules of construction to make sure we did not inadvertently change the meaning of a provision. That, of course, would be an impossible task. An alternative would be to make the new rules prospective only.

The **staff is ultimately skeptical** that a body of constructional rules would be really helpful either to the courts or to attorneys attempting to predict the rulings of the courts. Our observation is that the courts will ordinarily construe a statute in such a way as to give the result that appears correct, and will invoke or ignore relevant rules of construction en route to reaching that result.

SUGGESTED PRIORITIES

The Commission needs to determine its priorities for work during the remainder of 2002 and for 2003. Completion of prospective recommendations for

the next legislative session becomes the highest priority at this time of year. That is followed by matters the Legislature has indicated should receive a priority and other matters the Commission has concluded deserve immediate attention. The Commission has also tended to give priority to projects for which a consultant has delivered a background study — it is desirable to take up the matter before the research goes stale and the consultant is still available. Finally, once a study has been activated, the Commission has felt it important to make steady progress so as not to lose continuity on it.

Legislative Program for 2003

The Commission has completed work on the following matter which should be part of the Commission's 2002 legislative program:

- Stay of Mechanic's Lien Enforcement Pending Arbitration

The Commission has also recommended enactment of the following measure, which was amended into legislation during 2002 but did not receive a hearing:

- The Double Liability Problem in Home Improvement Contracts

The Commission needs to decide whether to seek reintroduction of this measure in 2003.

Topics under active consideration by the Commission on which work could be completed for the 2003 legislative session include the following:

- Exemptions from Enforcement of Money Judgments: Second Decennial Review
- Common Interest Development Law
  - Organization of Davis-Stirling Common Interest Development Act
  - Procedural Fairness in Association Rulemaking and Decisionmaking
- Reorganization of Discovery Statute
- Statutes Made Obsolete by Trial Court Restructuring: Part 2
- Obsolete Reporting Requirements

All of these matters are scheduled for consideration by the Commission in September 2002.

Legislature's Priorities

The Legislature has indicated several priority matters for the Commission:

Mechanics lien law. The Assembly Judiciary Committee requested that the Commission give priority to the study of mechanics lien law. The Commission has issued its recommendation on the double liability issue, and also made a report on *Mechanic's Lien Law Reform* generally. 31 Cal. L. Revision Comm'n Reports 343 (2001). The report concludes that a thorough review and revision of the mechanic's lien law and related provisions, including parts of the Contractors' State License Law, should be undertaken in order to modernize, simplify, and clarify the law, making it more user-friendly, efficient, and effective for all stakeholders. However, the Commission has not actually done the work on the general revision. The staff has prepared some background material. However, the staff expert, Stan Ulrich, is retiring in September 2002. It would require a diversion of resources from other projects to bring another staff member up to speed on the subject.

The Commission's report states that work on this project will continue "as Commission resources permit." The Commission needs to decide whether this is one it wants to sink its resources into at present. If the Commission wishes to continue work in the area, that implicates a redirection of resources from the common interest development project. Given the fact that the Commission is losing its one staff attorney who is expert in this area, that many of the simplest issues in the area have proved to be contentious, and that we anticipate further reductions in staffing next year, **the Commission may want to allow this one to lie fallow for now**. We have clearly signaled this possibility in our report to the Legislature:

> Substantial Commission time and staff resources have been and will continue to be devoted to large, statutorily mandated projects to recommend repeal of provisions made obsolete by the Trial Court Employment Protection and Governance Act, the Lockyer-Isenberg Trial Court Funding Act of 1997, and the implementation of trial court unification. See Gov't Code §§ 70219 (repealed by 2001 Cal. Stat. ch. 745, § 113), 71674. In addition, recent and impending budget cuts will limit the productivity of the Commission's staff.

31 Cal. L. Revision Comm'n Reports at 351, n. 6.

Obsolete provisions resulting from trial court restructuring. The Legislature directed that the Commission deliver a recommendation on statutes made

obsolete by trial court structuring by January 1, 2002. Gov't Code § 71674. The Commission delivered its recommendation more or less on schedule, but the recommendation was necessarily incomplete. SB 1316 would remove the statutory deadline, enabling the Commission to proceed in a more rational manner and at a more rational pace. **The staff would continue to give this cleanup project priority into 2003, but thereafter pick up loose ends from time to time, as other priorities allow.** We contemplate using summer legal intern resources from year to year to help wrap up issues that remain in limbo.

Trial court unification procedural reform. Although the Legislature has not directed the Commission to give trial court unification procedural reform a priority, the Legislature has directed the Commission to do it and there is perhaps more urgency to it than other topics on the Commission's agenda. We have spent a fair amount of time on appellate and writ review in a unified trial court system (peer review issue), and have deferred further work while the Judicial Council conducts a survey of perceptions of impropriety. We are actively working on criminal procedure problems under trial court unification. (See discussion below under "Consultant Studies.") The major remaining piece of the puzzle is a review of civil procedure. This is a joint project with the Judicial Council. The significant issue is whether to adjust the jurisdictional limits for small claims, limited civil, and unlimited civil cases in the unified courts. We have in hand empirical data prepared under a Judicial Council grant, and are planning active consideration by the Commission beginning in November 2002.

Protection of Personal Information. AB 125 (Papan) requires the Commission to study, report on, and prepare recommended legislation by January 1, 2005, concerning the protection of personal information relating to, or arising out of, financial transactions. The study is contingent on funding being provided in the 2002-03 Budget Act. Unless funding is provided in that act (which has not yet been adopted), the precondition of the ACR 125 study will not have been satisfied, and the Commission will not be authorized to make the study.

Consultant Studies

To the extent delivery of a background study by a consultant affects Commission priorities, it is useful to review studies delivered, and to be delivered, during 2002 (and beyond).

To date during 2002 we have received background studies on the following topics:

Review of criminal procedures under trial court unification. The Commission's consultant is Professor Gerald Uelmen of University of Santa Clara Law School. His background study analyzes California criminal procedures in light of trial court unification. The Commission has reviewed the study and directed the staff to prepare a draft tentative recommendation based on the study. The staff will present the draft for Commission review in November 2002.

Comparison of California Evidence Code with Federal Rules of Evidence. The Commission's consultant is Professor Miguel Mendez of Stanford Law School. He has delivered the first two parts of his study comparing the California Evidence Code with the Federal Rules of Evidence (and, where significant, the revised Uniform Rules of Evidence). The parts delivered to date deal with (1) Hearsay and Its Exceptions and (2) Expert Testimony and the Opinion Rule. Prof. Mendez expects to deliver the remaining parts over the course of the next year and a half. The Commission is scheduled to initiate active consideration of this study in September 2002.

Discovery Innovations from Other Jurisdictions. This study by the Commission's consultant, Professor Greg Weber of McGeorge Law School, was actually delivered in 2001. However, the Commission did not begin active consideration of it until this year in order to allow time for interested persons and organizations to review and react to it. The Commission is actively engaged in this project, and it is scheduled for further review by the Commission in September 2002.

We expect to receive two additional consultant studies by the end of the year:

Uniform Trust Code. The Commission has contracted with Professor David English, reporter for the Uniform Trust Code, to prepare a comparison of the Uniform Code with the California Trust Law. The contract calls for delivery of the study by December 31, 2001. The State Bar Trusts and Estates Section has agreed to cover the consultant's compensation for this study.

Arbitration improvements from other jurisdictions. The Commission has contracted with Professor Roger Alford of Pepperdine Law School for a background study on contractual arbitration provisions from other jurisdictions that may be appropriate for adoption in California. The study is due December 31, 2002. Prof. Alford reports he is on track to deliver the study this winter.

The Commission also has consultants engaged to prepare material for it on two other topics. These are:

General assignments for the benefit of creditors. The Commission has contracted with David Gould of Los Angeles to prepare a background study on possible statutory clarification of the law governing general assignments for the benefit of creditors. Mr. Gould has completed a substantial amount of work, including review of statutes of other jurisdictions, and has delivered an outline of the study. He has also prepared a questionnaire to obtain empirical data from persons active in the field. Mr. Gould has not set a completion date for his work. The funds available for the project have been exhausted, and no further funds will be made available.

Ripeness and exhaustion of remedies in inverse condemnation. The Commission has contracted with Professor Emeritus Gideon Kanner of Loyola Law School to prepare a study of the ripeness and exhaustion of remedies issue in inverse condemnation procedure. The study has been postponed pending key litigation in both state and federal courts on the issue. The contract has expired and funding has lapsed, but Prof. Kanner has indicated his intention to perform nonetheless. He has not set a completion date.

Other Active Topics

Apart from matters to be wrapped up for the 2003 legislative session, legislatively set priorities, and projects on which we have received consultant studies, the Commission has also commenced work on the following topics. We would try to give a reasonably high priority to these matters, so that, once activated, they do not become stale. However, the Commission's workload and resources are such that it is unlikely that steady progress can be made on all topics.

Common interest development law. This is a very large project. The Commission has decided to give priority to nonjudicial dispute resolution procedures under CID law. We are close to a final recommendation on procedural fairness in association rulemaking and decisionmaking. We have made substantial progress on alternative dispute resolution in common interest developments. Later in the study we will review the Uniform Common Interest Ownership Act, and analyze the hundreds of problems that have been identified with the Davis-Stirling Act.

Statute of limitations for legal malpractice. We have not yet reached the point of a tentative recommendation on this matter.

Attorney's fees. This is a complex and difficult project concerning the interrelation of the general attorney's fee statutes with those governing contractual attorney's fee provisions.

Uniform Unincorporated Nonprofit Association Act. The Commission has made substantial progress towards a tentative recommendation on this topic, and we can expect it to occupy some Commission time during the coming year.

Miscellaneous smaller topics. There are miscellaneous smaller topics the Commission has activated or is activating, that will need to be worked into the Commission's agenda on a low priority basis during the coming year. Examples are the standards for waiver of an evidentiary privilege (considered in July 2002) and inheritance involving a nonmarital child (scheduled for consideration in September 2002).

CONCLUSION

The Commission's agenda continues to be as full as it has ever been, or fuller. If we just stick with already activated projects, and projects on which background studies are to be delivered, we will have more than enough to keep us busy for the next year, and beyond.

The staff recommends no departure from the traditional scheme of Commission priorities — (1) matters to be completed for next legislative session, (2) matters directed by the Legislature, (3) matters for which the Commission has engaged an expert consultant, and (4) other matters that have been previously activated but not completed. Projects falling within each of these categories are identified above.

The staff recommends that no new topics be added to the Commission's calendar, and recommends no new priorities for other topics already calendared. (The two exceptions are (1) during the coming year the staff would clarify the "date of death" valuation provision for abatement of beneficiary interests to fund the share of an omitted spouse and (2) we would calendar the bad faith waste exception to anti-deficiency legislation some time in the future on a low priority basis). We could seek authority for the victims' restitution project with the intent to defer activation of the project, but the staff thinks it would be better to hold off until there is a realistic possibility we could get to it in the near term. Next year at this time we may or may not be in a position to schedule startup of some of the other backed-up topics such as covenants that run with the land, standardization

of attorney's fee statutes, the Uniform Custodial Trust Act, and the Subdivision Map Act.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Exhibit

NEW TOPICS AND PRIORITIES

Calendar of Topics Authorized for Study

The Commission's calendar of topics authorized for study includes the subjects listed below. Each of these topics has been authorized for Commission study by the Legislature. For the current authorizing resolution, see ACR 123 (Wayne).

1. Creditors' remedies. Whether the law should be revised that relates to creditors' remedies, including, but not limited to, attachment, garnishment, execution, repossession of property (including the claim and delivery statute, self-help repossession of property, and the Commercial Code provisions on repossession of property), confession of judgment procedures, default judgment procedures, enforcement of judgments, the right of redemption, procedures under private power of sale in a trust deed or mortgage, possessory and nonpossessory liens, insolvency, and related matters.

2. Probate Code. Whether the California Probate Code should be revised, including, but not limited to, the issue of whether California should adopt, in whole or in part, the Uniform Probate Code, and related matters.

3. Real and personal property. Whether the law should be revised that relates to real and personal property including, but not limited to, a marketable title act, covenants, servitudes, conditions, and restriction on land use or relating to land, powers of termination, escheat of property and the disposition of unclaimed or abandoned property, eminent domain, quiet title actions, abandonment or vacation of public streets and highways, partition, rights and duties attendant upon assignment, subletting, termination, or abandonment of a lease, and related matters.

4. Family law. Whether the law should be revised that relates to family law, including, but not limited to, community property, the adjudication of child and family civil proceedings, child custody, adoption, guardianship, freedom from parental custody and control, and related matters, including other subjects covered by the Family Code.

5. Offers of compromise. Whether the law relating to offers of compromise should be revised.

6. Discovery in civil cases. Whether the law relating to discovery in civil cases should be revised.

7. Special assessments for public improvements. Whether the acts governing special assessments for public improvement should be simplified and unified.

8. Rights and disabilities of minors and incompetent persons. Whether the law relating to the rights and disabilities of minors and incompetent persons should be revised.

9. Evidence. Whether the Evidence Code should be revised.

10. Alternative dispute resolution. Whether the law relating to arbitration, mediation, and other alternative dispute resolution techniques should be revised.

11. Administrative law. Whether there should be changes to administrative law.

12. Attorney's fees. Whether the law relating to the payment and the shifting of attorney's fees between litigant should be revised.

13. Uniform Unincorporated Nonprofit Association Act. Whether the Uniform Incorporated Nonprofit Association Act, or parts of that uniform act, and related provisions should be adopted in California.

Note: There is a typo in the resolution as enacted. It should read Unincorporated.

14. Trial court unification. Recommendations to be reported pertaining to statutory changes that may be necessitated by court unification.

15. Contract law. Whether the law of contracts should be revised, including the law relating to the effect of electronic communications on the law governing contract formation, the statute of frauds, the parol evidence rule, and related matters.

16. Common interest developments. Whether the law governing common interest housing development should be revised to clarify the law, eliminate unnecessary or obsolete provisions, consolidate existing statutes in one place in the codes, establish a clear, consistent, and unified policy with regard to formation and management of these developments and transaction of real property interests located within them, and to determine to what extent they should be subject to regulation.

17. Legal malpractice statutes of limitation. Whether the statutes of limitation for legal malpractice actions should be revised to recognize equitable tolling or other adjustment for the circumstances of simultaneous litigation, and related matters.

18. Coordination of public records statutes. Whether the law governing disclosure of public records and the law governing protection of privacy in public records should be revised to better coordinate them, including consolidation and clarification of the scope of required disclosure and creation of a single set of disclosure procedures, to provide appropriate enforcement mechanisms, and to ensure that the law governing disclosure of public records adequately treats electronic information, and related matters.

19. Criminal sentencing. Whether the law governing criminal sentences for enhancements relating to weapons or injuries should be revised to simplify and clarify the law and eliminate unnecessary or obsolete provisions.

20. Subdivision Map Act and Mitigation Fee Act. Whether the Subdivision Map Act (Division 2 (commencing with Section 66410) of Title 7 of the Government Code), and the Mitigation Fee Act (Chapter 5 (commencing with Section 66000), Chapter 6 (commencing with Section 66010), Chapter 7 (commencing with Section 66012), Chapter 8 (commencing with Section 66016), and Chapter 9 (commencing with Section 66020) of Division 1 of Title 7 of the Government Code) should be revised to improve their organization, resolve inconsistencies, clarify and rationalize provisions, and related matters.

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January 22, 2002

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Mr. Sterling:

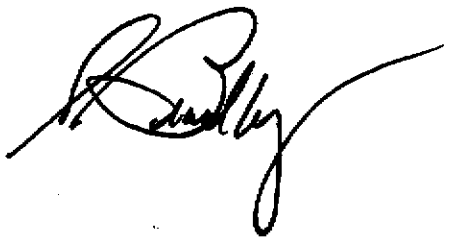
Thank you for your letter of December 17, 2001 regarding our Association's 1987 request for a survey of provisions for shifting of attorney fees in the California Codes. I have spoken with our executive director about the matter.

We presently do not have particular member interest in the area in question, and suggest it need not continue to be carried on the Commission's agenda.

Please accept my apology for the lack of response to your request for further input from the Association in 1991.

If I can be of service or assistance in any matters currently in progress with the Commission, please do not hesitate to contact me, and I will respond.

Very truly yours,



EX 4

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April 15, 2002

Nat Sterling
Executive Secretary
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Re: Civil Code Section 2929; The Nippon Credit Bank v. 1333 No. Cal. Blvd. (2001) 86 Cal.App.4th 486, 103 Cal.Rptr.2d 421(Review Denied, May 16, 2001)

Dear Nat:

Last year, a Court of Appeal in California rendered a decision in a case in which I was personally involved for a former client, referenced above. I believe the decision is an insult to common sense and to California law. The net result of the decision is to create a new California tort by judicial means, in which property owners could incur *tort* liability by defaulting in payment of real property taxes. I have written an article on the subject, published in the Miller & Starr Real Estate News Alert in the September, 2001 issue, and I enclose it herewith.

As you can see from the article and the decision, the case involved commercial office property in downtown Walnut Creek, but its impact will also extend to any property owner in California who, under economic stress, defaults in payment of taxes. While the banking industry (which was pleased with the decision) may have the common sense not to pursue individual homeowners and small property owners on this new tort, the same cannot be said of secondary lenders and other non-bank lenders, who will not feel so constrained by the potential impact of public opinion.

As you can see from my article, I feel strongly that the court lacked the basis for reaching its decision, and it essentially "converted" a contract obligation into tort, without proper opinion or analysis. I am proposing to amend Section 2929 of the Civil Code, which is the basis for the decision, by the addition of the following language:

"Default in payment of one or more installments of real estate taxes by the owner of a dwelling for not more than four families occupied entirely or in part by the

owner shall not be construed as a violation of this statute nor as "bad faith waste" of the mortgagees' security. (This amendment is intended to nullify the decision in The Nipon Credit Bank v. 1333 No. Cal. Blvd. (2001) 86 Cal.App.4th 486, 103 Cal.Rptr.2nd 421, to the extent it pertains to owner-occupied dwellings of up to four units.)"

The reason for the limitation in my proposal is practical: While I feel the decision is poorly reasoned and wrong for California, the banking industry and others have such strength in the legislature that I doubt that a more complete abrogation of the decision can be achieved. At least, with the amendment I propose, patterned after the language in the Code of Civil Procedure Section 580b, protection can be extended to homeowners from the impact of this decision.

I appreciate that we have not heard any public outcry yet over the *1333 N. California Blvd.* case (although several articles published by others expressed surprise at the scope of the decision last year), this is because the decision is so new that there has been no practical experience in living with its broad ruling.

Since the Law Revision Commission has open authority to suggest the changes in real property law, I want to urge that the staff take this matter up and that the Commission study it, with the view to making a recommendation to the legislature along the lines I have suggested or some similar approach.

Thank you for your cooperation and attention to this matter.

Very truly yours,

MILLER, STARR & REGALIA

Edmund L. Regalia

ELR:mlw/sh

Enclosure

Miller & Starr Real Estate Newsalert
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Edmund Regalia, Marvin Starr and Harry Miller founded the law firm of Miller, Starr & Regalia, headquartered in Walnut Creek. Mr. Regalia's litigation practice has concentrated on complex real estate and business litigation for over 40 years. Mr. Starr is the original co-author (with Harry Miller) of the *Current Law of California Real Estate* (1965-1967), later revised as *California Real Estate 2d* (1990) and *California Real Estate 3d* (2000-2001). His practice has included all aspects of real property law including the income tax aspects of real estate transactions. Both received an LL.B. (later J.D.) from Boalt Hall in 1958.

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EX 7

ARTICLE

Introduction. By recently denying a petition for review in *The Nippon Credit Bank v. 1333 North Cal. Boulevard* (2001) 86 Cal.App.4th 486, 103 Cal.Rptr.2d 421, review den. (May 16, 2001), the California Supreme Court has saddled borrowers of real estate loans with new "bad faith waste" tort liabilities, and possibly even punitive damages, if they fail to pay as little as a single installment of real property taxes during the throes of foreclosure of their properties due to defaults on their loans. This may shock the bar and most lay people of California, but it is true.

In *Nippon*, the plaintiff bank had financed completion of construction of a mid-size office complex in Walnut Creek with a 1989 non-recourse loan of $72 million to the borrowing partnership, 1333 North California Blvd. Soon thereafter the project was completed and began to fill with tenants. For a time all was well between the borrowers-owners and the lender. However, the California real estate recession, which commenced in late 1991, changed this happy picture. By the latter part of 1994, leasehold rental rates were down, vacancies were increasing, 5-year leases were expiring, and under the terms of the loan, the loan interest rate was to be adjusted upward commencing in 1995.

In October of 1994, finding the situation intolerable, the borrower opened negotiations with the lender to get interest rate relief, pending better economic conditions. The negotiations failed, and the borrower then pocketed rents from the project in December, January, and early February of 1995, until the lender gave notice in mid-February that it was withdrawing its consent for the borrower to retain rents under the negotiated "absolute assignment" clause in the deed of trust. In addition, after giving notice to the lender, the borrower failed to pay the December 1994 installment of real property taxes.[2] The lender put the property into receivership and foreclosed by trustee's sale in early 1996.

So, you will say, what's the big deal? This kind of thing has happened repeatedly in real estate loan transactions: A borrower becomes unhappy with the economics of his property, decides to let the property go back to his lender, and takes what income he can legally take from the property (including money otherwise used to pay taxes) until a receiver is appointed or the property is foreclosed. Both parties then go their own ways. Nippon Credit Bank, however, saw it differently. It sued the borrowers for "bad faith waste," claiming to be entitled to recover the unpaid taxes (which it had paid in the meantime), interest and penalties thereon, and punitive damages. At the trial, the evidence conflict sharply as to which party had and had not acted in good faith in the negotiations for

[1] The law firm of Miller, Starr & Regalia was formerly involved as counsel in the litigation of the principal case discussed in this article.
[2] Amounting to about .6% of the then reduced market value of the property.

interest rate relief on the *Nippon* loan. The bank claimed that it had been lulled into a false sense of security by the borrower's insincere negotiating ploys and that, under *Osuna v. Albertson* (1982) 134 Cal.App.3d 71, 184 Cal.Rptr. 338, it was entitled to recover the taxes and punitive damages because the nonpayment was "in bad faith."

The borrower denied these claims and asserted that by proceeding with foreclosure by trustee's sale, the bank was legally precluded from any further recovery under Code Civ. Proc., § 580d. The trial judge let the case go to the jury, and the jury saw it the bank's way, awarding both tax reimbursement and punitive damages. Two years later, in *Nippon Credit Bank v. 1333 N. California Blvd.*, cited above, the Court of Appeal affirmed. We will examine briefly the applicable and competing legal principles underpinning this decision.

California's Antideficiency Scheme. California has several laws which, working together, provide a comprehensive barrier to a lender's recovery of money from its borrower after acquiring the borrower's property through foreclosure. These mostly depression-era enactments were designed: (1) to focus the parties' attention on the security property as the principal source for the lender's recovery; (2) to force realistic valuations of that property and thus mitigate the exacerbations in security value which would often occur in volatile market conditions; and (3) to avoid large scale economic misery for borrowers who might otherwise be burdened with long-lasting deficiency judgments in a prolonged recessionary market. These laws include:

(1) the "security first" rule: A lender must first resort to the security property for the recovery of his loan moneys, see, e.g. *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 275 Cal.Rptr. 201, 800 P.2d 557;

(2) the "one-form of action" rule, requiring that a lender foreclose the security property as the legal means of recovering the loan moneys, Code Civ. Proc., § 726;

(3) the preclusion of deficiency judgments in the case of certain purchase-money loans, Code Civ. Proc., § 580b; and

(4) the preclusion of deficiency judgments where the lender proceeds to foreclose by trustee's sale rather than through Court foreclosure action, Code Civ. Proc., § 580d.

There are hundreds of cases construing these laws. Also there are a number of qualifications and exceptions, only one of which is dealt with here: "Bad-faith waste." It is the last of these antideficiency laws, § 580d, which was relevant in the *Nippon* case.

Development of the Bad Faith Waste Doctrine: The *Cornelison* and *Osuna* Cases. The first mention of "bad faith waste" occurred in *Cornelison v. Kornbluth* (1975) 15 Cal.3d 590, 125 Cal.Rptr. 557, 542 P.2d 981, where the beneficiary of a deed of trust sued for damages arising out of waste to the security property. The complaint set forth two causes of action, of which only the second was for waste. The California Supreme Court described *the first cause of action* as one for breach of contract, in which it was alleged that the defendant, who had purchased the property from the original trustors, had (1) *failed to pay real property taxes*, (2) failed to make payments on the note, and (3) failed to care for and maintain the premises.

The Court disposed of the issues on this first cause of action by finding that the defendant named in the case (the successor to the trustor) had not assumed any of these *contractual* obligations, and therefore the trial court had correctly entered summary adjudication in favor of the defendant on the breach of contract claim. (15 Cal.3d at pp. 594-596.)

The Supreme Court then described the *second cause of action* as alleging in substance that the defendant owed the plaintiff a distinct *extracontractual* duty to maintain the property improvements adequately and that the defendant had failed to fulfill that duty, thereby causing the plaintiff to be damaged in specified particulars and amounts by reason of a loss of the improvements and loss of use. (*Id.* at p. 594.)

In introducing its lengthy discussion of this *second* cause of action, to which most of the *Cornelison* decision was devoted, the California Supreme Court said:

"We now proceed to determine whether defendant's declarations are sufficient to support the summary judgment on the *second stated cause of action for waste.*" (*Cornelison, supra*, at p. 597; emphasis added.)

Thereafter, the Court surveyed the historical development of the common law doctrine of waste (15 Cal.3d at 597-99), and related that doctrine to California's antideficiency legislation (*id.* at 600-606). It finally concluded that a claim of *ordinary* waste would not survive the foreclosure remedy because it would be barred by the antideficiency rules, but it stated in dictum that a "bad faith" waste claim would survive.[3] Its opaque definition of "bad faith" would appear to encompass, at least, intentional waste or waste which the borrower had the economic means to avoid (*id.* at 604-605).

It must be emphasized that in discussing the second cause of action—the claim for waste—the *Cornelison* Court did not state that it was considering that *nonpayment of taxes* could constitute waste. Since the facts in *Cornelison* involved a house which was condemned by the county public health authorities as unfit for human habitation, it logically follows that in its consideration of "bad faith waste" the Court was focused, as the *Cornelison* case expressly stated, on traditional—physical property damage—waste.

Before *Nippon*, the only California case directly holding that nonpayment of taxes can constitute "bad faith waste" is *Osuna v. Albertson* (1982) 134 Cal.App.3d 71, 184 Cal.Rptr. 338, which purported to follow *Cornelison*. Before *Osuna* was decided, a different division of the same Court of Appeal held, in *Krone v. Goff* (1975) 53 Cal.App.3d 191, 127 Cal.Rptr. 390, that *nonpayment of taxes could not constitute waste*. Thus, a conflict exists in the Courts of Appeal on this issue (though in the same District), that never has been considered or resolved by the Supreme Court.

Osuna failed to analyze how mere breach of a deed of trust covenant for monetary payment (to pay taxes) can result in post-foreclosure *tort* liability. It misconstrued *Cornelison v. Kornbluth* (1975) 15 Cal.3d 590, by confusing the Supreme Court's discussion of breach of contract claims (including nonpayment of taxes) with its *later* discussion of waste and the accompanying suggestion of a unique and new California concept, "bad faith waste." And, even if the foregoing is not correct, *Osuna* is easily distinguished from the *Nippon* case, since in *Osuna* the real property security was actually and *entirely lost* to the secured creditor by virtue of *tax sales* which took place *before* any trustee's sale was conducted (i.e. after six years of tax defaults). In addition, because no trustee's sale took place, the tax obligation in *Osuna* was *not* merged into the debt and eliminated by a trustee's sale, as it arguably was in *Nippon*.

The "Split" Law Elsewhere. The law in other states is split on the question of nonpayment of taxes, some holding that waste consists only of physical deterioration or trashing the property and others holding that where nonpayment of taxes

[3] The *Cornelison* "bad faith waste" concept is dictum, because the Court decided that the plaintiff was not entitled to any relief, because she had entered a full credit bid at the trustee's sale, under the deed of trust.

results in severe economic consequences to the foreclosing lender, nonpayment can constitute waste, *Osuna*, 134 Cal.App.3d 71, 78. In all out-of-state cases, however, two important California ingredients are missing: California's antideficiency statutes, outlined above, and (2) the "bad faith" waste theory developed in *Cornelison*.

"Bad faith" waste is not a doctrine known elsewhere. Neither *Osuna* nor *Nippon* took these factors into account, but there is another critical aspect with which they also failed to deal, which will now be discussed.

Conversion from Contract to Tort. The California Supreme Court has made clear that, for the most part, a contract covenant cannot be "converted" into a basis for tort liability except in one field: insurance law. And there the imposition of tort liability is possible only because of the "special relationship" between insurer and insured. It has been true for more than 40 years that breach of the implied covenant of good faith and fair dealing can result in tort liability of an insurer to its insured, including, in cases of aggravated breach, liability for punitive damages. *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 328 P.2d 198, 68 A.L.R.2d 883, was the first in a long series of cases which developed this doctrine.

Over the years, subsequent cases imposed upon insurers tort liability for breach of contract duties, such as the duty to provide a defense, the duty to accept reasonable settlements within available policy limits, and the duty to pay policy benefits when liability becomes reasonably clear. The rationale for this doctrine was, in part, that an insurance company bears a "special relationship" to its insureds and that an insured buys an insurance policy for the security and protection it offers rather than for economic gain. Since, in addition, most insurance policies are adhesion contracts, there was good social justification for this doctrine, which converts the breach of contract covenants into tort liability in certain instances (see, e.g., *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1147-48, 271 Cal.Rptr. 246, review den. (Sep 13, 1990)).

For several years, it appeared that California Courts had expanded the doctrine to include other fields (see *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 164 Cal.Rptr. 839, 610 P.2d 1330, 9 A.L.R.4th 314 [employment]; *Cleary v. American Airlines, Inc.* (1980) 111 Cal.App.3d 443, 168 Cal.Rptr. 722 (disapproved of by *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 254 Cal.Rptr. 211, 765 P.2d 373) and (overruling recognized by *Brown v. Greyhound Lines, Inc.* (N.D. Cal. 1996) 1996 WL 45420, affd. (9th Cir. 1997) 116 F.3d 482) and (disapproved of by *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 100 Cal.Rptr.2d 352, 8 P.3d 1089 supra) [employment]; *Commercial Cotton Co. v. United California Bank* (1985) 163 Cal.App.3d 511, 209 Cal.Rptr. 551, 40 U.C.C. Rep. Serv. 234, 55 A.L.R.4th 1017 (disapproved of by *Roy Supply, Inc. v. Wells Fargo Bank* (1995) 39 Cal.App.4th 1051, 46 Cal.Rptr.2d 309, 27 U.C.C. Rep. Serv. 2d 1363) and (overruling recognized by *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 86 Cal.Rptr.2d 855, 980 P.2d 407) [banking]). In addition, in *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 206 Cal.Rptr. 354, 686 P.2d 1158, 39 U.C.C. Rep. Serv. 46 (overruled by *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 44 Cal.Rptr.2d 420, 900 P.2d 669) and (overruling recognized by *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 45 Cal.Rptr.2d 436, 902 P.2d 740), the California Supreme Court avoided applying the doctrine to commercial contracts generally by creating a related new tort—bad faith denial of the existence of a contract—applicable generally in commercial transactions.

These expansive decisions were subjected to a wide variety of criticism—both in legal literature and by other courts—as an expanding undue and improper fusion of contract and tort law. In addition to the impact of sound legal criticism, the views of the California Supreme Court on these issues changed substantially as a consequence of experience over time and changes in Court personnel.

Accordingly, in 1988 the California Supreme Court abolished the potential for such tort liability in the employer-employee relationship in *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 254 Cal.Rptr. 211, 765 P.2d 373. In 1994 the court held in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 28 Cal.Rptr.2d 475, 869 P.2d 454 that a contracting party could not be held liable in tort except when the conduct also violated an *independent duty* arising from principles of tort law (7 Cal.4th at 515). Then, in 1995, in *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 44 Cal.Rptr.2d 420, 900 P.2d 669, the Court abolished the tort established by the *Seaman's* case.

In summation, as the California Supreme Court has now firmly and consistently held, only in the field of insurance law can breach of a contractual obligation be converted into tort because of the "special relationship" of the insurer to the insured, and even that requires a showing of aggravated behavior in disregard of contract commitments to the insured, arising for the most part out of claims handling (see discussion, *passim*, in *Foley*, *Applied Equipment*, and *Freeman & Mills*, *supra*).

Waste is a *tort* doctrine, which developed centuries ago in the field of real property law (see *Cornelison v. Kornbluth*, *supra*, 15 Cal.3d at 597-599). As already emphasized, the Supreme Court in *Cornelison* did not discuss nonpayment of taxes in the portion of the opinion that dealt with the waste cause of action. In addition, as discussed below, there is no personal liability for property taxes in California, so it is difficult if not impossible to find an *independent duty* that could serve as a basis for tort liability.

Since There Is No Personal Legal Obligation to Pay Property Taxes in California, There Is No Extracontractual Duty to Support a Tort Claim. In California, there is *no* personal obligation to pay real property taxes created by statute or any other law. Such an obligation can arise in this State only if derived from express *contractual* provisions. Since the duty to pay taxes was *solely* a contractual obligation contained in a deed of trust, it was arguably merged out of existence when *Nippon* caused the trustee's sale to be conducted in January 1996. Any postforeclosure action to enforce the obligation to pay taxes was barred by the antideficiency provision of Code of Civil Procedure section 580d, *unless* there was an independent basis in law for tort liability for nonpayment.

As early as 1900 the California Supreme Court declared: "There is, however, no personal obligation upon the owner of land for the taxes levied against it, and the payment of such taxes can be enforced only by a sale of the land in the mode prescribed by the statute" (*McPike v. Heaton* (1900) 131 Cal. 109, 111, 63 P. 179). *McPike* was followed in *Henry v. Garden City Bank & Trust Co.* (1904) 145 Cal. 54, 56-57, 78 P. 228. In *William Ede Co. v. Heywood* (1908) 153 Cal. 615, 96 P. 81, as in *McPike*, the Court held that because a successor to defendant's grantee had no contractual relationship with defendant, the successor could not enforce implied covenants in the defendant's grant deed against the existence of encumbrances, and there was *no extracontractual basis for enforcement of any "general duty" on the part of defendant to have paid property taxes during the period of his ownership.*

EX 6

This consistent California rule of no personal liability for failure to pay real property taxes has been reaffirmed in more modern cases, as well:

> The general principles that apply to property taxes in California are that they "are imposed on the ownership of property as such; . . . no personal liability arises from their nonpayment, the sole security for the taxes being the property itself" (*City of Huntington Beach v. Superior Court* (1978) 78 Cal.App.3d 333, 340, 144 Cal.Rptr. 236; *Helvey v. Sax* (1951) 38 Cal.2d 21, 24, 237 P.2d 269 (property tax operates in rem against the property); *William Ede Co. v. Heywood* (1908) 153 Cal. 615, 96 P. 81; *Henry v. Garden City Bank & Trust Co.* (1904) 145 Cal. 54, 78 P. 228; *McPike v. Heaton* (1900) 131 Cal. 109, 111, 63 P. 179)

(*Garcia v. County of Santa Clara* (1978) 87 Cal.App.3d 319, 323-324, 151 Cal.Rptr. 80).

The *Nippon* Court Did Not Consider These Issues, Even Superficially. Unless nonpayment of real property taxes has always been part of the tort of waste in California, the foregoing issues cry out for intelligent discussion and resolution, something provided in neither *Osuna* nor *Nippon*. The historical record is clear: *Nonpayment of taxes was not a part of traditional waste*. Furthermore, there was and is no mention of nonpayment of taxes as waste in California until the 1982 *Osuna* case (or, if *the present article* is wrong in its analysis of *Cornelison*, until the dicta in that case, in 1975). As the Court in *Krone v. Goff, supra*, said in 1975: "None of the cases even suggest that the traditional and legal meaning of waste, as that word is used in a mortgage or deed of trust, embraces the failure to pay taxes" (53 Cal.App.3d at p. 195).

Therefore, paradoxically, the new tort has been established by conversion of a contract obligation into a tort at the very time when the California Supreme Court has attempted to limit such fusion where the standards for it (such as the "special relationship" between insurer and insured) cannot support the "conversion."

When one combines the conversion issue with the issues pertaining to California's antideficiency legislation and the *Cornelison* dicta pertaining to the murky and uniquely California "bad faith" formula, you have a formidable array of legal problems to sort through in any meaningful analysis of our newfound *judicially* created tort.

The Inaction of the California Supreme Court and the Result. Why is it that the California Supreme Court did not grant review, where there was an obvious conflict in the courts of appeal (*Krone v. Osuna*) and the issue is of undoubted statewide importance? Three possibilities or some combination of them suggest themselves:

(1) The Court *agreed* with the *Nippon* Court that nonpayment of taxes was tortious conduct and could involve malice ("bad faith"), thus justifying possible punitive damages. If so, the bar and the public would have benefited by at least having an analysis of the issues. The Court, in effect, has not by itsaumet its responsibilities e to takeail opportunity to explain the basis for the new tort.

(2) The Court and staff are and have been terribly overworked with criminal appeals and writs hence lack focus on complex civil issues and priorities among those issues.

(3) The Court was busy with other matters and concluded that it could revisit the issue at a later date, should it arise again, maybe even on a second appeal in the *Nippon* case. This possibility leaves the law as-is, with its shortcomings, until that "later day," thus possibly causing expense and trouble for people in the short-term should the Court ultimately take up this issue and decide it in a manner inconsistent with *Nippon*.

What is the practical effect of the *Nippon* decision? According to the reports circulating in banking industry publications shortly after *Nippon* was decided, banks are pleased, to say the least. However, they *may* act with restraint and pursue only the most egregious tax defaulters for economic reasons and to suppress any rising chorus of protest from consumer groups, which might result in legislative change. For example, it is doubtful that they would pursue homeowners, even those instant multimillionaire homeowners who have been dethroned by the collapse of the E.com businesses and the stock market. This, of course, is speculative because there are no limits to the *Nippon* decision as to classification of properties or owners, and the new tort applies across the board. Unless legislative relief is forthcoming, we are stuck with *Nippon*'s holding. C'est la vie, folks: welcome to our new, *judicially created* tort.

CASE BRIEFS

AGENCY

A partner did not commit fraud by refusing to pay the other partner's mortgage payments on partnership property and then purchasing the property at the foreclosure sale.

Jones v. Wagner (App. 2001) 108 Cal.Rptr.2d 669.

The Joneses formed a partnership with the Wagners to purchase a beachfront townhouse. Each couple agreed to contribute approximately one-half of the purchase price, with the Wagners paying in cash and the Joneses contributing cash plus a promise to make all payments owing on the mortgage.

When property values plummeted, the Joneses stopped making mortgage payments. The Joneses asked the Wagners to use funds from a joint bank account to make the mortgage payments. The Wagners refused. The lender foreclosed on the property. Mr. Wagner's pension trust and profit-sharing trust purchased the property at the foreclosure sale.

The Joneses sued the Wagners, alleging breach of contract and constructive fraud. The trial court rejected these claims, dissolved the partnership, and ordered an accounting. The accounting resulted in an award of damages to the Wagners on their cross-complaint. The Joneses appealed, arguing that the trial court erred in failing to find constructive fraud.

The Fourth Appellate District affirmed. Recognizing that the Wagners stood in a fiduciary relationship to the Joneses, the court concluded that the evidence did not support a claim of breach of fiduciary duty. The Wagners had no fiduciary duty to use partnership funds to pay the individual liability of the Joneses, who had agreed to make all mortgage payments and had stopped doing so. In effect, the Joneses asked the Wagners to contribute more than they had agreed to pay. The Joneses breached the partnership agreement by failing to make the mortgage payments, and the Wagners were under no obligation to bail them out.

With regard to the Wagners' purchase of the property at the foreclosure

EX 10

DIBBY A. GREEN

Date: Fri, 16 Aug 2002
To: sterling@clrc.ca.gov
From: "Dibby A. Green" <green@taxlawsb.com>
Subject: Comment re Study L-661 / Memorandum 2002-35

Dear Commission:

At the time the Griswold Case was decided, Attorney John W. Ambrecht, and I as the paralegal assisting, were working on a case with very similar public policy issues, although different facts (adoption by third parties where the parent and child relationship with the natural parent has been re-established and openly acknowledged). In light of California's present "open" adoptions, legislation in recent years enabling contact with the natural parents to be ongoing, and a recent Hague Convention on inter-country adoptions which immediately curtailed some of California's prior adoption policies, there are some significant public policy issues concerning intestate succession where a child has been adopted by third parties that the Commission may want to consider either as part of Study L-661, or at a separate time.

We have had published an article on our case which discusses the public policy issues, and the text is on our website at: http://207.154.94.195/resources/estates/adoption.htm. Should you wish to pursue this further, we would be happy to provide copies of our research, analysis, and the full text of the Ventura County Superior Court opinion.

Sincerely,

Dibby Allan Green, CLAS

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AMBRECHT & ASSOCIATES

Expanding Adoption Rights May Create Havoc for Estate Planners

By Dibby Allan Green, CLAS
and John W. Ambrecht

Originally published in *California Trust & Estates Quarterly*), published by the Estate Planning, Trust and Probate Section of the California State Bar, Vol. 7, No. 2 (Fall, 2001).

Most estate planning lawyers believe that a child adopted by third parties cannot inherit from an intestate natural parent. This may not be the case. Also, the man your client says is her son, may not legally be her "child." Your formula language for "child" and "issue" may not be sufficient in the current social climate of "open" adoptions, and with the number of natural families reunited after the adopted child has reached majority.

I. THE HAGUE CONVENTION AND NEW FEDERAL ACT

On October 6, 2000, The Intercountry Adoption Act of 2000 (HR 2909) (hereinafter "Act") was signed into law, implementing the 1993 Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoptions (29 May 93) (hereinafter "Convention"). This Convention had been signed by the United States in 1994, and the 2000 legislation was the formal ratification and implementation of it. The effect of this legislation was to instantly terminate a portion of California adoption law. Prior to the signing of the Act, twenty-two states had recognized foreign adoptions as a matter of comity, but California was not one of these. Instead, California had required re-adoption in California. [1] This new federal Act now prohibits the California requirement of re-adoption in that section 503(a) of the Act states, "The convention and this Act shall not be construed to preempt any provision of the law of any State . . . except to the extent that such provision of State law is inconsistent with the Convention or this Act, and then only to the extent of the inconsistency." Essentially, the Act preempts California adoption law.

Additionally, the Hague Convention recognized that adoptions in certain jurisdictions create a new and irrevocable legal relationship between the child and adoptive parents, which severs all legal ties between the child and his or her birth parents, including the right to inherit from the birth parents (sometimes termed "full" adoption here). [2] The Convention also recognized that adoptions in other jurisdictions do not have the effect of totally severing all ties from the birth parents, and do not sever the right to inherit from the birth parents (sometimes termed "simple" adoption). [3] Since at least 1955, with the Supreme Court decision of In re Estate of Calhoun [4], California adoption law has been one of "full" adoption which severs all legal rights (although opening up adoptions in the mid-1980's through the present has made this a bit muddy, as discussed below). [5] In earlier times, however, California adoptions were "simple" adoptions where certain legal rights within the natural family, including some inheritance rights with some relations, were retained. [6]

California intestate statutes are now written on the assumption that any adoption will be a "full" adoption severing all legal rights between the natural parents and children (e.g., if a son has been adopted by a third party, the son is no longer the mother's legal heir). [7] However, as of October 6, 2000, we have federal legislation requiring the recognition of "simple" adoptions and preempting any provision of state law which is inconsistent with the Hague Convention or the 2000 Federal Act. [8]

II. IT GETS A LITTLE MORE MUDDY ... NEW CALIFORNIA LAW

In 1955, the California Supreme Court felt it was a "better social policy" under then-present social conditions to protect secrecy in adoptions, and so affirmed "closed" adoptions where the identity of the blood relatives is not disclosed. [9] Thus, with a California adoption, the birth certificate would be modified and adoption records would be kept secret. However, since 1984, California has allowed birth parents who place children for adoption to consent, in advance, to future disclosure of their names and identities so that when the adopted children reach adulthood they may file a request for information and obtain the identity of the natural parents. [10] Social policy in the last several years is opening up adoptions in California (and most jurisdictions) even more widely.

In 1997, the Legislature authorized the use of "kinship adoption agreements" providing for continuing contact among adopting parents and birth relatives. [11] Recent legislation has expanded the use of these agreements. [12] The agreements are now called "postadoption contact agreements" and may be used by non-related (i.e., non-kin) adopting parents. [13] An interesting note in the Senate Floor analysis of SB 2157 AB 2921 was the report from the California Department of Social Services stating that in the three years from the 1996/1997 fiscal year, there was an 88% increase in the annual number of children placed for adoption by California's public adoption agencies and a 42% increase in the proportion of children in long-term foster care who are adopted, in spite of the increase in the foster care population. [14] The Department has been an advocate of

these "open" adoption laws as they allow more children to move out of the public system, and by their support helped to facilitate the move to allow these "postadoption contact agreements" even among parties who are not related.

The changing social climate and the recent Legislation not only allow, but somewhat advocate the ability of an adopted child to maintain regular contact with both the natural family and the adoptive family. Query: how does one interpret California intestate statutes in such a social climate where ongoing contact is maintained with the natural parents?

Furthermore, the questions may be broader than merely the intestate succession issues. If the natural parent leaves a will giving everything to "my child" or "my issue," the question still remains. What if the natural parent completed a statutory will, or looked at a form for guidance? Neither gives any indication that a child would not include a natural child adopted by third parties. The average person, in an open adoption, where the relationship with the natural parents continue, might expect that the natural parent's child are the "natural object of the bounty of their estate." However, under California adoption law, this may not be the case.

III. A CHILD OF POST-WAR ENGLAND ... A CASE IN POINT

Doris was a single woman in post-war England who had a child out of wedlock by a serviceman then stationed in England. Rationing was still going on in England at the time, Doris' family was not well off, and after six months she was at the end of her rope and unable to provide for herself and her child. With much anguish, feeling she had no other choice, she gave the child up for adoption so that he might be provided for. She met the adoptive mother (who gives her son the name Nigel) and she (Doris) said in her heart, "This is only a loan."

Under English law in 1948, adoption by a third party did not sever the legal right of inheritance between the natural mother and son ("simple" adoption). [15] Under California law in 1948, although the right to inherit from the natural mother would be severed (but not necessarily from other relatives), the Probate Code of 1931, section 257, then in effect states, "An adopted child does not succeed to the estate of a natural parent when the relationship between them has been severed by the adoption." [16] Calhoun (1955) stated that the adoption of this statute was not new legislation but a restatement of then-existing law pertaining to the rights of inheritance. [17] The right of intestate succession applied only "insofar as the right stems from a statute applicable because of the child's status in relationship to the adopting parent." [18] Thus, had Doris died in California in 1948, both under then-existing English and California intestate law her natural son, Nigel, would have the right to intestate succession notwithstanding his adoption by a third party.

Fast forward to Ventura County, California, March of 2000, where Doris, now a U.S. citizen and long-time California resident, dies. In the 1980's Doris had gone to much work to locate Nigel, still living in England, and had been successful. Her first letter to him stated she was looking for him for "his inheritance." They had a reunion in Los Angeles in 1985, and had several visits and an ongoing relationship since then. It was a neighbor who called Nigel to let him know Doris had had an accident, and he flew out to be with her in the hospital that last week.

No will could be found. Upon considerable investigation we pieced together the story that Doris interviewed with several estate planning attorneys over the years, but always decided she did not want to spend the legal fees to have a will and trust done. All of the lawyers contacted expressed surprise when (eventually) we let them know that Nigel had been adopted by a third party – Doris had never told them. None of Doris' neighbors knew he had been adopted. She openly held him out to everyone as her son and no one knew the wiser. Knowing this is a woman who does not want to spend legal fees for formal estate planning, in a sudden burst of intuition we asked one attorney with whom Doris met, "Did Doris ever ask what would happen to her estate if she didn't have a will and trust, and what did you answer?" Yes, came the reply, as the attorney did not know the son was adopted. When he was asked by Doris what would happen, he told her that her estate would all go to her son anyway. Bingo. Doris skipped the estate planning to save legal fees and figured she did not even need a will. Doris never thought it important to tell the attorneys she consulted with that Nigel was adopted by others, and they never asked her (and do any of us typically question people when they say so-and-so is my son or I have three children?).

IV. INTESTATE SUCCESSION IN CALIFORNIA

Whether the attorney comes to deal with a foreign adoption subject to the Hague Convention (like Doris and Nigel), or an "open" adoption where relationship (and expectations) of the natural parent and natural child are maintained (also like Doris and Nigel, and many other more recent adoptions in our changing social climate), the technicalities of the Probate Code intestate succession statutes are problematic.

The Probate Code provides that the intestate estate, where there is no surviving spouse, is to be distributed entirely to the "issue of the decedent." [19] Section 50 of the Probate Code defines "issue" as lineal descendants and refers to the definitions of child and parent. [20] "Child" is defined to mean any person entitled to take as a child by intestate succession, and "parent" is defined the same way, i.e., able to take by intestate succession. [21] Although it sounds circular, it is the same principle that the Calhoun court gave, which is that succession stems from the legal parent-child relationship. [22] As §6451(a) provides, "An adoption severs the relationship

of parent and child between an adopted person and a natural parent of the adopted person." [23] Note, also, that Probate Code §6453 provides means for establishing a natural parent relationship per the Uniform Parentage Act, and while normally used in paternity actions, the Act has also been used in maternity actions, such as in the case of a surrogate mother. [24]

It is interesting to note that neither the Probate Code nor the Family Code defines the term "adoption." Adoptions have always been creatures of statute; there was no common law adoption. [25] Therefore, what may be an adoption for one purpose, in one jurisdiction, may not be for another purpose in another jurisdiction. Or, in some jurisdictions, the legal right to inherit may be terminated, but not the right, for example, to pursue a wrongful death claim or collect under a workers' compensation policy. [26] In California, at one time, inheritance rights were maintained between the adopted child and a natural sibling, grandparent, or aunt, even when the inheritance rights from the natural parent had been severed. [27] Hence, an interesting predicament: Prior to the United States' October 6, 2000, legislation implementing the Hague Convention, California's adoption laws did not recognize a foreign adoption and would require re-adoption. [28] Thus, for purposes of California adoption laws, is Nigel still deemed to be Doris' child? If he is her child, is he her heir for California intestate succession purposes?

Consider the purposes of the intestate succession statutes. The California Supreme Court case of *Estate of Joseph* [29] reviewed the California Law Revision Commission (CLRC) work regarding intestate succession statutes and states that the CLRC's purpose was to provide new rules "framed in light of 'changes in the American family and in public attitudes,' 'that are more likely' than the old ones 'to carry out . . . the intent of a decedent without a will is most likely to have had,' evidently at the time of death." [30] In our example case, ample evidence is available to show Doris' intent that Nigel inherit her estate.

V. HOW WOULD YOU DECIDE THE CASE?

We admit, before doing the research and exploring the facts, we initially told Nigel he did not have a chance. However, Nigel was persistent, and with further research it became clear to us that the issue was not intestate succession statutes per se, but whether the legal parent and child relationship between Doris and Nigel existed at the time of Doris' death in March of 2000. Hence, the crux of the issue was the meaning of the term "adoption" in Probate Code §6450(b) and §6451(a).

We filed our points and authorities which looked at the intent behind California intestate succession statutes (i.e., upholding the decedent's intent), and showed the following: that the then-existing English adoption law did not sever the parent and child relationship in 1948; that under California law, Nigel would still be Doris' heir for intestate succession purposes (at least until 1955); that under California law [prior to October 6, 2000] requiring re-adoption and not recognizing foreign adoptions, Nigel's adoption should not be recognized in California; that Doris' holding out Nigel to the world as her son served to re-establish the parent-child relationship if it had been deemed severed; that as of March, 2000, when Doris died, the United States' signature on the Hague Convention in 1994 meant that nothing would be done in contravention of the Convention [31], and that the Convention recognized "simple" adoptions like Nigel's 1948 English adoption; and that given the broadening of California adoption laws to now provide for "open" adoptions and "postadoption contact agreements," public policy considerations should lead to very broad interpretation of intestate succession statutes. What was most clear in Doris and Nigel's case (which may not be true for many other adoption cases in California) was that central to all the other issues was the choice of laws issue – 1948 versus 2000 laws, English law versus California law, and the affect of the Hague Convention. We argued from the Restatement of Conflict of Laws, Second, that under the conflict of law principles, the legal parent and child rights should be determined under 1948 English law.

The Ventura County Probate Judge, Melinda A. Johnson, also thought the issue centered around the conflict of laws question, and that the question was determined by the Hague Convention. Her ruling (Estate of Doris Wallwork, Decedent, Case No. P074911, Ventura County Superior Court) states:

> The court is convinced that the Hague Convention and specifically Article 26 is the controlling legal authority . . . . It specifically states that the "receiving state", here California, shall assure that [Nigel] enjoys rights equivalent to those resulting from an adoption in the original contracting state, i.e. England. The United States is a signatory to the Hague Convention.
>
> In essence, the Hague Convention answers the "choice of law" question. If California law applies, [Nigel's] rights and responsibilities in regard to his biological mother terminated upon his completed adoption, although this may or may not have been the case even in California in 1948. However, [Nigel] enjoyed a right under British law which he does not under California law . . . . He is entitled to inherit from his biological mother. This is a significant right and nothing about enforcing it violates any public policy of the State of California. . . .
>
> Equitably, the laws of intestacy are broadly intended to effectuate the intent of the testator. It attempts to follow the normal "natural" inclinations of the average person. Here, [Doris'] intentions are well-known and undisputed. It would be anomalous to enforce the precise letter of one section of the Probate Code which says that adoption severs the rights of biological children to

take from their parents against the overriding intent of the entire Probate Code which is to effectuate the intent of the testator. [Emphasis added.]

The ruling is beautiful and does justice. Regretfully, it is not one which can be used as precedent.

These sorts of inheritance questions pertaining to adopted persons are bound to arise with more and more frequency in the future, both with California adoption laws becoming more open, and with the implementation of the Hague Convention.

Endnotes

[1] See Family code §§8904(c) and 8919(a) and (b).

[2] Explanatory Notes to the *Adoption (Intercountry Aspects) Act of 1999*, UK Statutes, which received Royal Assent on 27 July 1999 (Ch. 18), prepared by the UK Department of Health, paragraph 26.

[3] Explanatory Notes to the *Adoption (Intercountry Aspects) Act of 1999*, UK Statutes, which received Royal Assent on 27 July 1999 (Ch. 18), prepared by the UK Department of Health, paragraph 27.

[4] (1955) 44 Cal.2d 378; 282 P.2d 880

[5] See part II.

[6] *Estate of Calhoun* gives a historical review of California law pertaining to adoptions, including the development of legal and inheritance rights.

[7] See Probate Code §6402(a), and definitions of terms at §§26, 50 and 54, together with definitions of parent and child relationship at §§6450 and 6451(a).

[8] Section 503(a) of the Act provides: "Preemption of Inconsistent State Law. - The Convention and this Act shall not be construed to prempt any provision of the law of any State . . . except to the extent that such provision of State law is inconsistent with the convention or this Act, and then only to the extent of the inconsistency."

[9] *Estate of Calhoun* (1955) 44 Cal.2d at 387.

[10] See Family Code §§8702(b) and 8818(b).

[11] Family Code §§8714.5 and 1814.7.

[12] AB 2921 and SB 2157 from California's last legislative session [2000] were chaptered (Ch. 910 and Ch. 930, respectively, Statutes of 2000) and were effective January 1, 2001.

[13] Family Code §8714.7.

[14] SB 2157, Senate Floor Analysis, August 19, 2000, page 6, reference to the California Adoption Initiative Update issued by the Department of Social Services on January 19, 2000.

[15] UK Statutes, *Adoption of Children Act*, 1926, §5(2).

[16] Probate Code of 1931, §257.

[17] 44 Cal.2d at 384.

[18] 44 Cal.2d at 384.

[19] Probate Code §6402(a).

[20] Probate Code §50.

[21] §26 and §54, respectively.

[22] 44 Cal.2d at 384-386

[23] With some exceptions not related to this discussion. (See also §6450).

[24] See *Johnson v. Calvert* (1993) 5 Cal.4th 84, 851 P.2d 776, 19 Cal.Rptr.2d 494, 61 USLW 2721, and *In*

re Marriage of Buzzanca (1998) 61 Cal.App.4th 1410, 72 Cal.Rptr.2d 280, 77 A.L.R.5th 775.

[25] See *Brock and Others v. Woolams* (1949) 2 K.B. 388.

[26] See *Meadow Gold Dairies v. Oliver* (1975) 535 P.2d 290, 1975 OK 67 [Oklahoma, natural child adopted by third party is eligible to receive workers' compensation benefits where natural father's death resulted from a work injury]. See discussion of New York law at United States Trust Company of New York, Practical Drafting Commentary, April, 1992.

[27] See discussion of the history of California law pertaining to inheritance rights of adopted persons in *Estate of Calhoun* (1955) 44 Cal.2d 378, 282 P.2d 880.

[28] Family Code §§8904(c) and 8919(a) and (b).

[29] (1988) 17 Cal.4th 203, 949 P.2d 472.

[30] 17 Cal.4th at 209, quoting 16 Cal. Law Revision Comm. Rep. (1982) pp. 2318, 2319; which report also states on p. 2318 that "intestate succession rules should conform to what the testator probably would have wanted if he or she had made a will."

[31] See Peter H. Pfund [U. S. Dept. of State] *1993 Hague Convention on Intercountry Adoption, Briefing Paper (Revised) Status: May 1995* (1995), which states that the United states' signature to the Convention is mainly a symbolic act which signals "an intention to seek authority eventually to ratify the convention and commitment not to act contrary to the object and purpose of the convention in the interim."

This article: www.taxlawsb.com/resources/estates/adoption.htm

July 16, 2002

California Law Revision Comm.
California Bar Assn.

Re: Superior Court of San Mateo
case # 109790
Estate of Helen M. Brodersen, deceased

My sister, Helen Brodersen, died on May 15, 2002. When she executed her Will in 1989, she named me as her sole executor, without bond.

On July 9th my attorney informed me that the judge decided to invoke a law requiring nonresident executors to post bond. Alternatively, my attorney has obtained agreement of the heirs for me to serve without bond.

This letter is to object to the law under which I was ordered to post bond for the following reasons:

1) I am 76 years old and have never been involved in a criminal matter.

2) I have owned my home in Arizona since December 1994.

3) From 1958-1964, I held a Secret clearance while employed by General Dynamics/astronautics in San Diego. Investigation went back to childhood.

4) When government contracts were cancelled and I was laid off in 1964, I was employed by Edmund Herman as a legal trainee in San Diego.

5) Over the next 26 years until I retired, I

worked as a secretary in the legal field, eventually earning the rating of Professional Legal Secretary ("PLS") by sitting for a two-day exam given by the Legal Secretaries Assn. in Tulsa. In addition, I was a notary.

My complaint about this bond law is that a named executor could have a long criminal record and still receive Letter Testamentary if he/she has a California address (and serve without bond). Does this not appear to you to be not only insane, but a perversion of the law? Yes, the executor needs to be of good character, and if not, to be put under bond. And yes,

if the executor lives out of state, proof of stability should be required. But to focus only on "no California address" seems to me (and to everyone with whom I have discussed this) to lack good sense.

This law should be rewritten and refined in order to achieve its purpose: protecting the estates of deceased people from deliberate mishandling

Sincerely,

Patricia Conrey

Ms. Patricia Conrey
10429 W Sun City Blvd
Sun City, AZ 85351-3858

GERALD H. GENARD

Date: Mon, 25 Mar 2002
To: sterling@clrc.ca.gov
From: ghgena <ghgena@yahoo.com>
Subject: Suggestions for repeal and amendment of deadwood and discriminatory legislation

Set forth below is a discussion of legislation which should be repealed or amendment to remove discriminatory or illogical provisions.

INCONSISTENT ATTORNEY OBLIGATIONS

California Business and Professions Code section 6068 (e) makes it one of the duties of an attorney " To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client".

There are no exceptions to this duty in the Business and Professions Code. By contrast, California Evidence Code provisions do not make the attorney-client privilege absolute. Evidence Code section 956 provides that there is no privilege if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud. Section 956.5. provides that there is no privilege if the lawyer reasonably believes that disclosure of any confidential communication is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

OK, so how does a lawyer disclose information in a situation falling under Evidence Code sections 956 or 956.5 without being in violation of Business and Professions Code section 6068(e)? Did the Legislature fail to amend Section 6068(e) when these exceptions to the attorney-client privilege were created? If so, why haven't they fixed the situation ?

COHABITATION

Family Code Section 4323.provides, in part, that " unless otherwise agreed to by the parties in writing, there is a rebuttable presumption, affecting the burden of proof, of decreased need for spousal support if the supported party is cohabiting with a person of the opposite sex." Why just "opposite sex" ?

When rent and other living expenses are shared between the supported spouse and a cohabiting partner, why isn't the need for support presumptively less, regardless of the sex of the partner? Moreover, is there any reason to provide that the parties can enter into an agreement to change the resumption and, if so, that such agreement must be written? If such presumption made any sense if the first place, why would the parties consider agreeing to change it? Why should a court be bound by such an agreement?

TRAINS, PLANES AND AUTOMOBILES

The crime of trying to wreck a train is subject to more severe punishment than the crime of wrecking a train-as long as no one dies as a result of the wreck. The California Penal Code (sections 218 et seq.) provides that if you intend to wreck a train but don't succeed, the penalty is life WITHOUT POSSIBILITY OF PAROLE. Section 219, however, provides that if you succeed in wrecking the train, and no one dies, the penalty is life WITH POSSIBILITY OF PAROLE. If someone dies as a result of the wreck, then the penalty the penalty is a death sentence or life without possibility of parole.

By comparison, throwing a rock or engaging in any other unlawful act which results in damaging a vehicle operated by a common carrier (like a bus carrying passengers) results in imprisonment for 2, 4 or 6 years, BUT ONLY IF THERE IS BODILY HARM. If no bodily harm, then the penalty is up to 1 year in jail or a fine not to exceed $2,000, or both. (see Penal Code sections 219 .1 et seq.). Dropping an object (like a paving stone) from a bridge is a misdemeanor- BUT ONLY IF THE BRIDGE IS A TOLL BRIDGE. (Penal Code Section 219.3).

There is no specific statute dealing with downing airplanes or blowing up bridges,other than railway bridges, of course. (see Penal Code section 219 et seq.)

TO VEX AND ANNOY

Has anyone been prosecuted for common barratry ?

According to Penal Code section 158,common barratry is the practice of exciting groundless judicial proceedings, and is punishable by imprisonment in the county jail not exceeding six months and by fine not exceeding one thousand dollars. However, Penal Code section 159 limits the crime by stating that no person can be convicted of common barratry except upon proof that he has excited suits or proceedings at law in at least three instances, and with a corrupt or malicious intent to vex and annoy.

Seems like it's ok to vex and annoy as long as one has the more suitable motive-to obtain money, at least as long as it cannot be shown that a claim is totally inconceivable. Is it still possible to make such a showing in California and still meet the criminal burden of proof beyond a reasonable doubt?

By the way, anyone know anything about "uncommon" barratry?

LIQUOR SALES

What prompted such intense concern over the selling (as opposed to the drinking) of liquor near universities and veterans homes? The Legislature seems to have adopted a course of action which has them fine tuning in this area as opposed to the more obvious and logical approach of leaving such issues to licensing authorities. (See Penal Code sections 172 et seq.) For example, it is illegal to sell intoxicating liquor within one mile of the university grounds of certain named

universities but not others. (E.g. UC Berkeley and UC Santa Barbara). The distance is measured from the border of the grounds only as they existed in 1959 at UC Davis and UCLA, or 1961, at Santa Barbara , but the prohibited distance at Davis is three miles and only 1 and 1/2 miles at UCLA. (Oh, by the way, there is an exemption at Berkeley for any club that has been in existence for at least 35 years, provided, among other things, that it has at least 500 members, owns the club property, and restricts membership to males). A catchall section covers other universities having an enrollment of more than 1000, in which case the prohibited selling distance is 1 mile, but only if at least 500 students live on campus, and only if the principal administrative offices of the university are located at such place. Is the need for a drink is greater if the students have to be close to the administrators? Anyone who remembers being a student having to deal with the university administration would probably answer with a yes.

However, it is harder to explain a situation where, for example, why. If there is a university with an enrollment of 5,000, and 4600 live off-campus, then it's ok if the off-campus housing can be located next to bars and liquor stores. Stranger still is the question of why it is ok to sell liquor near a university where the enrollment is less than 1000 students.

Then, there is a similar limit prohibiting liquor sales within 1 and 1/2 miles of any home or asylum for former military personnel except for the Veterans' Home in Yountville (because it is in the Wine Country?).

The Legislature was careful to provide that the prohibited distance "shall be measured not by airline" but by following the shortest highway. (What does this mean? A straight line? "As the crow flies"? Is this just another governmental abuse of the English language like calling swamps and marshes "wetlands"?) Better to use ordinary English.

LAWRENCE W. STIRLING

From: "Stirling, Lawrence W" <LStirlMD@sdmc.co.san-diego.ca.us>
To: "'Nathaniel Sterling'" <sterling@clrc.ca.gov>
Subject: RE: Penal Code restitution statutes
Date: Mon, 14 Jan 2002

How about reviewing the Penal Code sections dealing with restitution both civil and criminal. It is really garbled now.

The victims restitution, child support, and fine enforcement programs all suffer from the same defect. They are mostly government staff remedies which means next to no remedy at all.

Child support orders are civil orders. When the lawfully ordered payment becomes overdue, the order should ripen into a judgment by operation of law and interest on the unpaid amount should then join the obligation along with the actual and reasonable costs of collection collectible in accordance with the civil and ccp. This would allow mom to retain an attorney at the defaulters expense and not the childs.

Same with victims assistance and the collections of all fines, forfeitures, penalties and court costs.

Not done so now and as a result billions of dollars are lost annually.

We have a bloated and ineffective bureaucracy instead.

Could I give you one simple example?

The courts of this state are not required to create an annual financial statement or have such audited by an independant auditor and have the result presented to the appropriate oversight agencies.

The courts are a massive revenue producing operation that doesnt bother.

Last year, the judges of San Diego County assessed over eighty million dollars in fines and forfeitures. These revenues go to support the CHP, local police and other important functions.

Of the eighty million the judges assessed, about eight million was actually paid. The court staff took no action to collect the rest.

This is unjust for many reasons and it is also clearly bad business.

I would hope that someone would pass a law ordering the courts to adopt current accounting methods and produce an annual financial report and have

it audited in accordance with AICPA standards including the additional elements of compliance and efficiency.

The results of these indpendants audits should be reported to the two judiciary committees, the AG, the Governor and the members of the judicial counsel.

This simple requirement would provide a huge promote justice, provide a huge revenue source, and provide a stream of recommended improvements in court operations each year forever.

It would all be self-funded as the court would then have to get off its lazy butt and collect some of the fines the legislature mandated it to do.

The effects would spill over into child support and victims assistance, both multi-billion dollar public policy deficiecies.

The Superior Court
OF THE
State of California
SAN DIEGO

CHAMBERS OF
LARRY STIRLING
Judge of the Superior Court

Mailing Address
POST OFFICE BOX 122724
SAN DIEGO, CALIFORNIA 92112-2724

July 30, 2002

Ms. Joyce G. Cook
Chairperson
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303

Dear Ms. Cook:

Please consider legislation to clear up whether misdemeanors charged with felonies require "prove up" at preliminary hearings.

The District Attorney offers to "prove up" misdemeanors that are jointly charged with felonies during felony preliminary hearings.

Our legal team and many judges believe this to be the proper approach. They believe that unless or until the legislature or an appellate court makes it clear that there is no longer any such requirement, it is safer to do so.

However, other judges believe that misdemeanors need not be "proven up," during such hearings and that it is a complete waste of time and precluded by Proposition 115.

The confusion arises from the fact that two cases (*People v. Thiecke* (1985) 167 Cal.App.3d 1015, 1018; and *People v. Medellin* (1985) 166 Cal.App.3d 290) hold that probable cause for misdemeanors must be shown in a preliminary hearing and that they may be challenged via a PC 995 motion.

Subsequently, the statute those cases relied upon (PC 737) was amended to change the wording from "public offense" (which includes all levels of crime--PC 15) to "felonies."

However, please note that PC 872 still requires the magistrate to issue a holding order when the evidence shows that a "public offense" has been committed.

The text of "California Preliminary Examinations," section 4.1.7, concludes that the courts should not read Prop 115 as eliminating the holdings of *Thiecke* and *Medellin*, because there is no indication that it was intended to do so. Further, as noted in that section of the text, *Thiecke* provided at least one valid reason for providing additional procedural rights to those charged with both misdemeanor and felony offenses: defendant's right to a speedy trial on the misdemeanor offense is reduced because it is joined with a felony. I think one other reason already mentioned is because PC 872 still requires a holding order as to all public offenses.

In addition, PC 738 still requires a preliminary hearing and a holding order before an information is filed. A third reason is that PC 995 allows a defendant to challenge any offense charged in an information, which includes misdemeanors joined with felonies. Having a preliminary hearing transcript that includes evidence as the felony offenses but not the misdemeanors would make it problematic for a defendant to challenge a misdemeanor charged in an information.

Please consider addressing in legislation clarification of the impact of Proposition 115 on the scope of preliminary hearings.

If a defendant is charged with a felony and is provided a preliminary hearing, must the prosecutor prove up on any misdemeanors contained on the same complaint?

Thank you for your time and attention to this request.

Sincerely,

LAWRENCE W. STIRLING
Judge of the Superior Court

LWS:srt

The Superior Court
OF THE
State of California
SAN DIEGO

CHAMBERS OF
LARRY STIRLING
Judge of the Superior Court

Mailing Address
POST OFFICE BOX 122724
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July 23, 2002

Ms. Joyce G. Cook
Chairperson
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303

Dear Ms. Cook:

I respectfully recommend your support of a minor change in the law that should have a substantial positive impact on the administration of justice.

Penal Code 1538.5, a very commonly used section of the law, permits defense challenges in misdemeanors or felonies to the admissibility of evidence obtained in violation of rights guaranteed by the Fourth Amendment to the United States Constitution.

Penal Code 1538.5 is not procedurally available to challenge the production of similar evidence IF the basis of the challenge is of Fifth Amendment origin, such as *Miranda*, voluntariness, etc.

Fifth Amendment challenges are normally pursued via PC 995 motions after a preliminary hearing or ultimately via *in limine* motions in front of an assigned trial judge.

There is no really speedy remedy in misdemeanor cases. Therefore, one of the few remedies in Fifth Amendment challenge cases is to wait for a trial to be set and make the *in limine* motion before the trial judge.

This seems to be a wholly unnecessary procedural delay.

It is, therefore, my RECOMMENDATION: That you amend PC 1538.5 to permit the defense to raise ANY suppression of evidence issues resting on constitutional grounds. The most important result would be to provide a substantial SIMPLIFICATION of the law.

It will be much easier for everyone to understand that there is at least one clear, timely, and effective remedy to provide an early test of important and potentially dispositive evidence issues early in the process.

The adoption of such an amendment would promote more timely resolution of cases.

Very often, and indeed, most often, the resolution of these fundamental suppression motions is DISPOSITIVE of the case itself.

There is simply no reason for either side to continue the process if certain evidence is clearly admissible or inadmissible. The case will most often be dropped or settled based on the evidentiary ruling. There is no reason not to resolve such a fundamental issue as early as possible.

Finally, there is no reason NOT to allow PC 1538.5 to address any and all constitutional evidentiary issues.

This is a noticed motion and all public agencies are very experienced in dealing with it. It is a perfectly good mechanism to resolve a critical matter early in the proceedings.

I, therefore, urge you to amend the California Penal Code as soon possible to provide for this important improvement that serves the ends of justice.

Thank you for you time and attention to this recommendation.

Sincerely,

LAWRENCE W. STIRLING
Judge of the Superior Court

LWS:srt

Attachments:
1) *People v. Superior Court (Keithley)* 13 C.3d 406; 118 Cal.Rptr. 617, 530 P.2d 585
2) *People v. Superior Court (Zolnay)* 15 C.3d 729; 125 Cal.Rptr. 798, 542 P.2d 1390

The Superior Court
OF THE
State of California
SAN DIEGO

CHAMBERS OF
LARRY STIRLING
Judge of the Superior Court

Mailing Address
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August 16, 2002

Ms. Joyce G. Cook
Chairperson
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303

Dear Ms. Cook:

I respectfully recommend that you undertake a cleanup of the various victim's restitution laws.

This seems to be a popular subject in which to legislate. I am familiar with this area because as a member of the legislature, I carried the very first civil-restitution legislation over 20 years ago. The result of substantial legislative activity over the years is that the statutes have become very confused.

The restitution laws are a veritable thicket of laws that are often redundant, often inconsistent, and unnecessarily complicated.

Here are my suggestions:

1. Repeal (clean out) all existing legislation concerning victim's restitution and replace such by locating all related laws in ONE newly created section of the Penal Code.

2. Repeal and do not reenact or state or restate ANY CIVIL CODE (CC) or CODE OF CIVIL PROCEDURE (CCP) remedies anywhere in the Penal Code.

   The problem with restating bits and pieces of the CC and CCP in the Penal Code is that, first, it is unnecessary. A simple "submit to civil process" or "pursuant to civil process" is sufficient to activate all applicable CC and CCP remedies. But more importantly, doing such creates great confusion as to which remedies are available to the criminal judge. Does the criminal judge have available ONLY the CCP and CC remedies that have been restated in the Penal Code? Hopefully not. But it is a rule of construction that if the legislature creates a list, it excludes anything not listed. Not listing all the CC and CCP remedies raises the implication that they are not available. That would be terrible for victims.

   Also, if or when the CC or CCP are updated, authors may not know that portions have been restated in the Penal Code and neglect to make parallel

amendments. That would CREATE TWO BODIES OF CIVIL LAW. That is not good public policy or legislative drafting.

THERE ARE THREE LARGE AND VERY DISTINCT VARIETIES OF VICTIM'S RESTITUTION LAW. THEY ARE SO DISTINCT THAT THEY SHOULD BE: CLARIFIED, SEPARATED, AND CROSS-RELATED ONLY WHERE APPROPRIATE.

They are: 1) criminal restitution orders, 2) civil restitution orders, and 3) restitution grants via the State Board of Control (SBC).

A. CRIMINAL RESTITUTION ORDERS

"Criminal restitution orders" are entered by the courts as CONDITIONS OF PROBATION. They "sound" in the notion of rehabilitation of the defendant, not the interests of victims. They are terms and conditions of probation voluntarily accepted to STAY OUT OF JAIL. The important point about them is that failure to comply with them results ONLY IN A REVOCATION OF PROBATION. And while a revocation of probation might be a good thing, IT DOES NOTHING FOR THE VICTIM. The victim is not better off if probation is revoked. It does not put money in the victim's pocket. Indeed, it makes it less likely that the victim will ever collect because the defendant may lose employment.

AND arrests make it less likely that the defendant will again acquire gainful employment. There is an appropriate reason for restitution to be ordered as a term of probation. There is also a good reason to order RESTITUTION FINES (one source for the restitution grants, an entirely different matter) as a term and condition of probation. But neither directly helps the victims.

The important point here is that enforcement of restitution via the probationary process is VERY PROBLEMATICAL. It almost never happens. The probation departments do not have the staff to follow up on substantive probation matters, let alone hundreds of thousands of restitution orders. Probation officers do not claim to be good "bill collectors." This is pretty much a "barren remedy" for the victim. It may be a good defendant punishment tool, but it is little else.

Finally, as presently enforced, when they are enforced, criminal restitution orders often result in "debtor's prisons," something that we Americans have always prided ourselves in not having.

B. CIVIL RESTITUTION ORDERS

Another section should contain all the provisions for civil restitution orders. The great thing about these orders is that because they held the victim, they are enforceable directly by the victim. The victim does not have to wait for the probation bureaucracy or the court bureaucracy to get around to "working on the case." Under the terms of the law, this

provision allows the restitution orders to be enforced as civil judgments. This sidesteps the need for the victim to retry the case in the civil court. This process permits the issue of restitution/civil damages to be resolved in a timely manner upon sentencing.

These civil orders are self-enforcing by being self-financing, survive bankruptcy, tax liens, the termination of probation, and carry interest at the legal rate from the time of the loss. The civil restitution order shifts the financial burden to the person who caused the problem, the guilty defendants, and away from the innocent victims, the probation departments, the courts, and the taxpayers.

In addition, and very important, the civil process is very mature in deciding what the defendant CAN pay and how and when he SHOULD pay it. AND IT DOES NOT CREATE A DEBTOR'S PRISON.

The CC and the CCP, as a matter of public policy, are very sophisticated in sorting out how and when the civil defendants have to pay. Any defendant that works in good faith with the system will be treated fairly, will not go to jail, will be protected in his home and employment, and does not face the arbitrary event in which a warrant has been issued for his arrest without his knowledge.

C. RESTITUTION GRANTS VIA THE STATE BOARD OF CONTROL

This is an entirely separate area of law with its own processes. It is also a very large and growing body of law.

Because of a long history of the CRIMINAL restitution orders being ineffectual and civil restitution to this very day hardly ever being used, the notion of creating a revenue supply via restitution fines was created. Money flows from the restitution fines and other sources into a bureaucracy. The SBC, which sponsors much legislation, then takes the money, prescribes a grant-application process, administers the grant-application process, and then provides money to victims. This program includes high "transaction costs" to support the staff, state and local. In addition, the legislature, has in the past, delivered this money for other purposes.

The SBC has recently successfully sponsored legislation in which their payment to victims "raises a presumption" that the court must order the defendant to pay grants by the SBC, EVEN THOUGH THERE HAS BEEN NO DUE PROCESS.

This is very questionable law and runs against the very deeply held American notions of due process in our laws. It may be held violative of due process someday. It should be repealed. The SBC can substitute in for a victim (subrogate), but "due process" should not be suspended in regards to SBC actions.

In any event, the administration of this grant program should be clearly distinguished from civil and criminal restitution orders. And the SBC should understand that by making a grant, it does so at its own risk unless they have required enough admissible documentation to withstand a "preponderance of the evidence" and "proximate result" tests when they hand out money.

CONCLUSION

Creating a new division in the Penal Code and consolidating and harmonizing all the restitution laws would be a great service to victims throughout our state. I have been working with and on these laws for many years, and I can tell you that they are so incoherent, practitioners in the field avoid dealing with them.

Why, for example, must an ABSTRACT OF JUDGMENT be provided to the County Recorder to exercise the civil remedies? Why not just a copy of the judgment? Why should the victims have to pay the County ANOTHER FEE to pursue their rights as victims? Why not charge that by law to the defendant and let the County collect it from the defendant and not the victim?

Why should criminal restitution orders EXPIRE upon the expiration of probation? Why shouldn't failure to pay restitution automatically extend probation instead?

Why not make the restitution order civil and criminal at the same time? Why should it require the court to think about different ones? If restitution is ordered, why can't the civil remedies attach automatically?

And finally, please make sure that "the costs of collection" and interest on the unpaid balance automatically remain in the civil order. It is only those two provisions that make the civil remedy work at all.

I would be glad to work with your staff in replanting this thicket into an attractive and effective hedge.

All the best,

LAWRENCE W. STIRLING
Judge of the Superior Court

LWS:srt